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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF RHODE ISLAND.

EDWARD C. STINESS,

REPORTER.

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1913.

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JUN 6 1913

JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. EDWARD C. DUBOIS.

ASSOCIATE JUSTICES.

HON. CLARKE H. JOHNSON.

HON. C. FRANK PARKHURST.

HON. WILLIAM H. SWEETLAND.

HON. WALTER B. VINCENT.¹

ATTORNEY-GENERAL.

HERBERT A. RICE, Esq.

ASSISTANT ATTORNEYS-GENERAL.

HARRY P. CROSS, Esq.²

LIVINGSTON HAM, Esq.³

ABBOTT PHILLIPS, Esq.

A. A. CAPOTOSTO, Esq.⁴

¹ Qualified March 27, 1912.

² To April 1, 1912.

³ From April 1, 1912.

⁴ From May 1, 1912.

RHODE ISLAND REPORTS—VOL. XXXIV.

These reports are published in accordance with the provisions of Chapter 277 of the General Laws of 1909 of the State of Rhode Island.

The cases reported include the decisions, opinions, and rescripts of the Supreme Court, involving questions of law, pleading, or practice, from March 15, 1912, to December 6, 1912.

EDWARD C. STINESS,

Reporter.

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PROVISIONS CONSTRUED OR CITED BY THE COURT.

ARTICLE I.

"Sec. 8. The congress shall have power; To establish . . . uniform laws on the subject of bankruptcies, throughout the United States."

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ARTICLE XIV (AMENDMENTS).

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CONSTITUTION OF RHODE ISLAND.

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ARTICLE I.

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"Sec. 12. No *ex post facto* law, or law impairing the obligation of contracts shall be passed."

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C A S E S
HEARD AND DETERMINED
BY THE
SUPREME COURT OF RHODE ISLAND.

JOHN J. LACE, Assignee *vs.* CLARENCE A. SMITH *et als.*

MARCH 5, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Constitutional Law. Bankrupt and Insolvent Laws.*

Under the provisions of Cons. U. S., Art. I, § 8, "The congress shall have power:—to establish uniform laws on the subject of bankruptcies, throughout the United States," this power when exercised and to the extent that it is exercised, is exclusive. However it is not the mere existence of this power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the states.

(2) *Conflict of Laws. Bankrupt and Insolvent Laws.*

A state has authority to enact bankrupt or insolvent laws that do not conflict with Federal bankrupt laws then in force.

(3) *Conflict of Laws. Bankrupt and Insolvent Laws.*

Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with the national bankrupt act of 1898, for though the bankrupt act suspends the operation of any state insolvent law where there is any conflict between the two, the state law remains in full force in so far as there is no conflict, and as the bankrupt act expressly exempts from its involuntary proceedings, wage earners and farmers, the power of the state exists over such cases.

(4) *Constitutional Law. Bankrupt and Insolvent Laws.*

Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with U. S. Cons. Art. I, § 10, and R. I. Cons. Art. I, § 12, in that it impairs the obligations of contracts or is retroactive, for as to any contract made after its passage, the act entered into such contract as part of the existing law, and as to an ordinary open account between attorney and client for services which commenced prior to the passage of the act the obligation of

the contract remains unimpaired, although its value may have been impaired by the neglect or the attorney to use due diligence in the collection of his charges.

(5) *Same.*

Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with U. S. Cons. Art. XIV of amendments, or R. I. Cons. Art. I, § 10, as depriving a person of property without jury trial and due process of law, since in a bill in equity brought by an assignee in involuntary insolvency, to recover property alleged to have been conveyed in fraud of creditors, a jury trial may be had upon issues of fact, while such a proceeding is one well recognized as appropriate for that purpose in the law of the land.

BILL IN EQUITY on facts stated in opinion. Certified on constitutional questions.

DUBOIS, C. J. This is a bill in equity brought in the Superior Court by the complainant as assignee, in involuntary insolvency, of Clarence A. Smith aforesaid; a person engaged chiefly in farming, or the tillage of the soil. The complainant therein alleges that said Smith on the 29th and 30th days of September, 1909, being insolvent and acting in contemplation of insolvency, and with the intent to hinder, delay and defraud his creditors, conveyed and transferred certain real and personal property to the respondent Mowry who knew, or had reasonable cause to believe, that said Smith was so insolvent and acting in contemplation of insolvency, with intent to hinder, delay and defraud his creditors. The complainant prays that said conveyances and transfers be adjudged invalid; that said Smith and Mowry may be ordered to convey said property to him, and that they be required to account for their use and occupation of said real estate. The respondents severally have made answer to the bill and said Mowry has brought in question upon the record the constitutionality of Gen. Laws, 1909, cap. 339, entitled "Of proceedings in insolvency," whereunder the complainant derived his appointment and qualification as assignee as aforesaid, and the constitutional questions thus raised have been duly certified to this court for hearing and determination.

The constitutional provisions which the respondent asserts have been violated by the chapter in question are the following: United States Constitution, Art. I, Section 10: "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts;" Amendments to the United States Constitution, Art. XIV: "No state shall make or enforce any law which shall . . . nor shall any state deprive any person of life, liberty or property without due process of law;" Constitution of Rhode Island, Art. I, Section 10: "No person shall be deprived of life, liberty or property unless by the judgment of his peers, or the law of the land;" and Section 12 thereof: "No *ex post facto* law, or law impairing the obligation of contracts shall be passed."

Shortly after the entry of the case in this court the respondent Mowry filed the following motion to dismiss the same:

"PROVIDENCE, Sc.

SUPREME COURT.

JOHN J. LACE, JR., Assignee

vs.

CLARENCE A. SMITH, *et al.*

} Constitutional question
No. 440.

"In the above entitled case, wherein said John J. Lace Jr. brings his bill of complaint against Clarence A. Smith et al in his pretended capacity of assignee to set aside certain conveyance of real estate &c mentioned in his said bill of complaint, made by said Smith deft. to deft. Marquis D. L. Mowry and therein in his said bill of complaint pretending to be assignee in insolvency of said deft. Clarence A. Smith in a pretended petition filed in the Superior Court for Bristol and Providence Counties on to wit: the 21st day of January A. D. 1910, under the provisions of cap. 339 of the General Laws of Rhode Island, wherein he alleges said Clarence A. Smith was insolvent, and duly adjudged insolvent on to wit: the 20th day of June A. D. 1910, said complainant alleges and pretends he was duly appointed and qualified as such assignee of the estate of said Clarence A. Smith insolvent; on the petition of certain creditors of said Clarence

A. Smith deft. to wit: on the petition of James N. Smith executor of the will of Hope T. Williams deceased &c.

"The defendant M. D. L. Mowry moves that said bill of complaint and all the proceedings thereunder and that said Insolvent petition and all the proceedings therein be dismissed from and out of this court and said Superior Court for the following reasons.

"1st. That said Clarence A. Smith was at the time said Petition on to wit: the 21st day of January 1910 filed in said Superior Court against him then was and now is owing debts to the amount of one thousand dollars and more, and avers that he then owed and now owes more than three thousand dollars.

"2d. That said cap. 339 of the General Laws of Rhode Island is *null and void* being in conflict with 'An act to establish a uniform system of bankruptcy throughout the United States approved July 1, A. D. 1898,' and the amendments thereof, which act now is and has been in full force and effect ever since its enactment.

"3d. That said cap. 339 and the provisions thereof, act upon the same subject matter and the same persons as the said United States Bankrupt Law, therefore null and void.

"4th. The two Statutes have the same general object, to wit: to discharge and release the debts of the Bankrupt and Insolvent, and act upon the same persons and the same causes (with some exceptions, and this case does not come within the exception) by similar modes and different jurisdictions the object of both statutes is to discharge an insolvent or bankrupt from his debts, on complying with the provisions of the said statutes, and they are in conflict with each other in their operation and provisions, Wherefore said Insolvent Law cap. 339 is null and void.

MARQUIS D. L. MOWRY for himself."

The motion to dismiss raises a jurisdictional question by attacking the foundation, not only of the bill in equity, but also of the proceedings in insolvency upon which the bill is

based. If the motion should be granted, the whole case including the constitutional questions raised therein, would terminate and cease to exist, therefore it becomes necessary to first inquire into the validity of the motion. The insolvent law in question originated May 26, 1908, when it was passed by the legislature as cap. 1577 of the public laws, nearly ten years after the passage of the Federal Bankruptcy act. Under the provisions of the United States Constitution, Art. I, sec. 8: "The congress shall have power:—To establish . . . uniform laws on the subject of bankruptcies, throughout the United States." That this power when exercised, and to the extent that it is exercised, is exclusive upon the subject cannot be successfully denied.

(1) Almost a century ago, in the case of *Sturges v. Crowninshield*, 4 Wheat. 122, it was determined that the power so granted to congress, is unlimited and supreme, but not exclusive. In the course of his opinion Chief Justice Marshall, said, p. 192: "In considering this question, it must be recollected, that previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respects, sovereign. These states could exercise almost every legislative power, and among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting

from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.

“Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying, that this was an insolvent, not a bankrupt act; and therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying, that this was unconstitutional, and the commission a nullity.

“When the laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the Union possesses the

power of enacting bankrupt laws; and those of the states, the power of enacting insolvent laws. If it be determined, that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the courses of descents, a distinct line of separation must be drawn, and the power of each government marked with precision. But all perceive that this line must be, in a great degree, arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say, who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislatures may exercise an extensive discretion.

“This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious, that much inconvenience would result from that construction of the constitution, which should deny to the state legislature the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient, that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence

of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

"It has been said, that congress has exercised this power: and by doing so, has extinguished the power of the states, which cannot be revived by repealing the law of congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress. Without entering farther into the delicate inquiry respecting the precise limitations which the several grants of power to congress contained in the constitution, may impose on the state legislatures than is necessary for the decision of the question before the court, it is sufficient to say, that until the power to pass uniform laws, on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contains no principle which violates the 10th section of the first article of the constitution of the United States."

Subsequently, in the case of *Ogden v. Saunders*, 12 Wheat. 213, it was held that the power of congress "to establish uniform laws on the subject of bankruptcies throughout the United States," does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress, and the state laws conflict with those of congress. As was said in that case by Thompson, J., at p. 312: "Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government, to relieve a debtor from his contracts, when necessity, and unforeseen misfortunes, have rendered him incapable of performing them; and whether this power is to be exercised by the states individually, or by the United States, can make no difference in principle, in a government

like ours, where sovereignty, to a modified extent, exists both in the states, and in the United States. It was, in the formation of the constitution, a mere question of policy and expediency, where this power should be exercised; and there can be no question, but that, so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce, and should be uniform throughout the United States. A bankrupt system deals with commercial men, but this affords no reason why a state should not exercise its sovereign power, in relieving the necessities of men who do not fall within the class of traders, and who, from like misfortune, have become incapable of performing their contracts.

“Without questioning the constitutional power of congress to extend a bankrupt law to all classes of debtors, the expediency of such a measure may well be doubted. There is not the same necessity of uniformity of system, as to other classes than traders; their dealings are generally local, and different considerations of policy may influence different states on this subject; and should congress pass a bankrupt law confined to traders, it would still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that state shall deem expedient.”

In this connection the following language employed by Mr. Justice Clifford in the opinion of the court, delivered in the case of *Baldwin v. Hale*, 1 Wall. 223, at p. 228, is illuminating: “Controversies involving the constitutional effect and operation of State insolvent laws have frequently been under consideration in this court, and unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, that there are some things connected with the general subject that ought to be regarded as settled and forever closed.

“State legislatures have authority to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy, conflicting with such law; and, provided the law itself be so framed

that it does not impair the obligation of contracts. Such was the decision of this court in *Sturges v. Crowninshield*, 4 Wheat. 122, and the authority of that decision has never been successfully questioned."

- As early as the year eighteen hundred congress recognized the authority of the states in the premises for in Section 61 of the bankruptcy law, passed in that year, they made the following provision: "This act shall not repeal or annul or be considered to repeal or annul, the laws of any state now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act." Similar provisions have been omitted from all subsequent bankruptcy statutes, doubtless on account of the decisions of the Supreme Court rendered in the cases of *Sturges v. Crowninshield* and *Ogden v. Saunders*, *supra*. As there is no longer doubt of the authority of the state legis-
- (2) lature to enact bankrupt or insolvent laws that do not conflict with Federal bankrupt laws then in force, the question for determination therefore resolves itself into this: Do the provisions of Gen. Laws, 1909, cap. 339, conflict with those of U. S. Statutes at Large, cap. 541, passed July 1, 1898, and its amendments and additions in their application to the case under consideration.

The reasons urged in the third and fourth grounds of the motion to dismiss respectively are: that the State and Federal statutes act upon the same subject matter and the same persons, and upon the same persons and the same causes (with some exceptions, which do not include this case). Under said cap. 339, sec. 12: "Any inhabitant of this State owing debts in this state to the amount of three hundred dollars or more, and who shall be insolvent, may prefer his voluntary petition under oath for relief as an insolvent." And under the provisions of Section 21 of the same statute: "One or more creditors holding in the aggregate claims not less than one-fourth in amount of all the debts as they appear at the time of adjudication of insolvency, may prefer a petition in insolvency against a debtor." It thus

appears that under the State statute the initial step to secure the benefit of its provisions may be taken either by the insolvent debtor, or by his creditors.

Under the provisions of the Federal law, Sec. 4, a: "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." And under said sec. 4, b, with certain exceptions, any natural person, and certain corporations, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of the act. The exceptions alluded to comprise wage earners and persons engaged chiefly in farming, or the tillage of the soil. It is manifest therefrom that the respondent Clarence A. Smith, being a person engaged chiefly in farming or the tillage of the soil, is expressly excepted and exempted from the involuntary provisions of the bankruptcy act. As a person, said respondent is entitled to the benefits of the act if he seeks them as a voluntary bankrupt, but he cannot be forced into involuntary bankruptcy because he is a farmer. If the State and Federal statutes conflict it must be because the former may be applied to a person included within the terms of the latter. However, no such conflict has arisen in this case. Clarence A. Smith, who is entitled to apply for the benefit of the bankruptcy act, did not make application for relief as an insolvent under the state statute. Neither is there in this case any conflict of jurisdiction between the State and United States courts. Up to the present time the State courts have taken jurisdiction of the parties and subject matter of the litigation, and, for aught that appears, nothing has been done in the way of invoking the jurisdiction of the courts of the United States in the premises. But the argument that State statutes must not be applied to persons who may be entitled to relief under the Federal law takes too narrow a view of the subject. To repeat the language of Chief Justice Marshall: "It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over

such cases as the laws of the union may not reach." *Cases* and not *persons* alone should be the test. Tried by this test, does the bankruptcy act provide for the involuntary bankruptcy of wage earners or farmers? It not only does not, but specially exempts them from its provisions. Therefore the power of the state may be considered as existing over such cases.

We are aware that these views are not in harmony with those expressed by some of the eminent jurists in other states, as for example, in the language of Knowlton, J., in *Parmenter Manuf. Co. v. Hamilton*, 172 Mass. at p. 180: "We are of opinion that the language (of the U. S. Bankruptcy law passed on July 1, 1898), was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the statute." And in that of Strout, J., in *Littlefield v. Gay*, 96 Me. 422: "Under the Bankrupt law, Blackington could have gone into bankruptcy voluntarily, but could not be forced in by his creditors under involuntary proceedings. He was asked to go in and refused. It was argued with great ability that in that condition the State insolvency law may be invoked. Plausible as the argument is, we do not regard it as sound. At any time after proceedings under the State law, Blackington could have voluntarily invoked the Bankrupt Law, and thereupon all proceedings under the State law would necessarily cease. The test of jurisdiction under the State law does not rest upon the volition of the debtor. If his person and property are or may be subject to the Bankrupt Law, then as to him and his possessions the State insolvency law is in abeyance and powerless. Upon any other view, it would be in the power of the debtor at any time to oust the jurisdiction of the State court after it had been assumed. This would result in great confusion. It may be avoided by holding, as we do, that where the person falls within the purview of the Bankrupt Act, whether by voluntary or involuntary proceedings, the State insolvency law must be silent." Also in that of Spear, J., in *Moody v. Development Co.* 102 Me. 384: "Our conclusion

is that Chapter 85 of the laws of 1905, with respect to the clauses herein considered is in effect an insolvent law and is suspended and superseded by the National Bankrupt Act of 1898, as to all insolvent corporations, whose property may be subject, by either voluntary or involuntary proceedings to the authority and jurisdiction of said act" and, "We deem it unnecessary to discuss the possible suggestion that the Act of 1905 was passed after and while the National Bankruptcy Act was in force and that, consequently, it could not technically be suspended or superseded; but the answer to this is, that it was still-born, never had any life and never went into operation."

Notwithstanding these positive assertions we are better satisfied to rest upon the firm foundation laid nearly a century ago by the sages of the law in the celebrated cases hereinbefore cited, at least until such foundation shall be shaken in the tribunal wherein it was first established. But we are not alone in assuming, nor the first to assume this position. For in the case of *Old Town Bank v. McCormick*, 96 Md. 341 (1903), it was held that a State law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors was not superseded by the Bankrupt Act of 1898. The opinion of Fowler, J., reads as follows:

"This is an appeal from the Circuit Court for Harford county. On the 22d of May, 1901, the Old Town Bank of Baltimore filed a petition in insolvency against J. Lawrence McCormick and others under the provisions of Art. 47, secs. 22 and 23, of our Code, relating to insolvents, as amended by the act of 1896, ch. 446. The defendants each pleaded to the jurisdiction of the Court. Their pleas are identical. The plea is as follows: '(1) That this Court has no jurisdiction in these proceedings, because the insolvency laws of the State of Maryland have been suspended, superseded, or rendered inoperative by the passage of a National Bankrupt Law by the Congress of the United States, and this defendant pleads the said bankrupt law in bar of the jurisdiction of this Court in the premises.' The plaintiff bank

demurred to these pleas, but the learned Judge below overruled the demurrers, and his certificate states the question raised and decided on the demurrers as follows: 'That the enactment of the Act of Congress approved July 1, 1898, entitled 'An Act to Establish a uniform system of bankruptcy throughout the United States,' and supplements and additions thereto, suspended the operation of Art. 47 of the Code of Public General Laws of Maryland, 1888, entitled 'Insolvents,' and all amendments thereof, and especially suspended the operation of sec. 22 (as repealed and amended by the Act of 1896, ch. 446), and sec. 23 thereof, including the operation of said Article on persons 'engaged chiefly in farming and tillage of the soil,' and the class of persons to which the defendant, J. Lawrence McCormick, is alleged in the petition to belong, and that this court is without jurisdiction to grant any of the relief prayed for in said petition.' From the order dismissing its petitions the plaintiff has appealed.

"The issue thus presented is clear and well defined.

"The defendants contend that the enactment of the National Bankruptcy Act suspended the operation of the whole insolvent law of this State, while the plaintiff maintains the position that the passage of this national law by Congress suspends the operation of our insolvent law, *only so far as our law conflicts with the national law*, and that, inasmuch as the present bankrupt law (Act of Congress, 1898) contains no provision for involuntary bankruptcy of persons engaged chiefly in the tillage of the soil, the provisions of our State Insolvent Law, so far as they apply to that excepted class, remain in full force and effect.

"The question presented must depend, in the first place, upon the provisions of the bankrupt law applicable here. Section 4, 'Who may become bankrupts,' sub-section (a) provides that 'Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act *as a voluntary bankrupt*.' And by sub-section (b) it is enacted that 'Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil . . .

may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.' . . .

"1. From the year 1819, when Chief Justice Marshall, delivered the opinion of the Supreme Court of the United States in the leading case of *Sturges v. Crowninshield*, reported in 4 Wheat. 122, it has been held that the provision of the Constitution of the United States, Art. I, sec. 8, (4) providing that Congress shall have power to establish uniform laws on the subject of bankruptcy, does not *in itself* inhibit the States from passing valid insolvent laws. In the case just cited it was said: 'It is not the mere *existence* of the power, but its *exercise*, which is incompatible with the exercise of the same power by the States.' And so also there has been a uniform line of decisions to the effect that so far as Congress has failed to legislate with reference to insolvents, State laws relating to them are operative. Thus in *Sturges v. Crowninshield*, *supra*, it is said that 'if it is not the mere *existence* of the power but its actual *exercise* by the Congress of the United States which prevents the operation of State insolvent laws it is obvious that much inconvenience would result from that construction of the Constitution which should deny to the Legislatures of the States the power of acting on this subject in consequence of *the grant* to Congress.' 'It may be thought more convenient', continued the court, 'that much of it should be regulated by State legislation, and Congress may *purposely omit to provide for many cases* to which its power extends. It does not appear to be a violent construction of the Constitution, and certainly a most convenient one, to consider the power of the State *as existing over such cases as the laws of the land may not reach*.' But in *Ogden v. Saunders*, 12 Wheat. 213, the rule is explicitly laid down that 'the power of Congress to establish uniform laws on the subject of bankruptcy does not exclude the rights of the States to legislate on the same subject, except when the power has been actually exercised, and *the State laws conflict with those of Congress*. And to the same effect are *Baldwin v. Hale*, 1 Wall. 229, *Tua v. Carriere*, 117

U. S. 210; *Ex parte Eames*, 2 Story, 322. In the recent case of *R. H. Herron Co. v. Superior Court, &c.*, decided in April of last year by the Supreme Court of California, and reported in 68 Pac. Rep. 814, 136 Cal. 279, it was held that 'though the Federal Bankruptcy Acts suspend operation of any State laws of insolvency, where there is any conflict between the two, the State laws remain in full force in so far as there is no conflict; and as the Bankruptcy Act of 1898 expressly exempts all corporations from *voluntary bankruptcy*, and only makes subject to involuntary bankruptcy, corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,' and the provisions of the State law applicable to a corporation engaged principally in mining (as was the California corporation) are not suspended. In the course of its opinion the court said: 'If the Bankruptcy Act excepts a class of cases from its operation, either in express terms or by necessary implication, it must be considered that it was the intention of Congress not to interfere in that class of cases with the laws of the several States in reference thereto.' A number of cases are cited by Justice Harrison, who delivered the opinion of the court, and among them is that of *Clarke v. Ray*, 1 Har. & J. 318, C. J. Chase delivering the opinion of the court. He said: 'The Legislatures of the several States have competent authority to pass laws for the relief of all persons who are not comprehended within the Acts of Congress.' See also, *Van Nostrand v. Carr*, 30 Md. 128. It should be remarked however, that the situation in the California case just cited somewhat differs from the one here presented. For there the insolvent proceeded against under the California Insolvent Law was expressly excepted from the provisions relating to the voluntary system, and was not included within, and therefore excepted by implication from the class of corporations made subject to the involuntary system, while here the defendant who is sought to be declared an insolvent under our insolvent law is included under the general terms of the voluntary system and expressly excepted from the involuntary system. See also, *E. M. Shepardson's Appeal*, 36 Conn. 23; *Geery's*

Appeal, 43 Conn. 289; *Steelman v. Mattix*, 36 N. J. L. 344; 16 Am. & Eng. Ency. 642 (2nd ed.).

- "2. This brings us to the real question in the case, namely, (3) is there any conflict between our Insolvent Law and the Federal Bankrupt law?

"We have already transcribed the provisions of Section 4, by which it appears that the defendant is expressly excepted from the provisions of the act relating to involuntary bankruptcy, and, therefore, as to this class to which the defendant belongs, *i. e.*, farmers or tillers of the soil, the Federal power has not been exercised. And it, therefore, follows that if this class is not within the State law, there is no existing provision under which those embraced within it can be compelled to distribute their assets fairly and equally among their creditors. In *Geery's Appeal*, *supra*, it was said: 'The benefit of this principle (the equal distribution of a debtor's property without preference) cannot be denied to a creditor without doing him injustice. It is a remedy which he relied on in giving credit, and to which he is fairly entitled. If that remedy is not to be found in the Bankrupt Act, it will not be presumed that Congress intended to take away the remedy provided by the State, Congress having limited and restricted the operation of the Bankrupt Act, leaving a number of cases to which it does not apply, it will not be presumed that it was thereby intended to leave creditors in such cases entirely without remedy, as must be the case if the State law is entirely inoperative.' But can it be properly or correctly said that any *conflict* can exist between the State and the Federal law so long as the latter by express terms excludes from its operation the subject or class of persons expressly provided for by the State law? The power to enact insolvent or Bankrupt Laws is vested in the States, and it cannot be extinguished except by the establishment of a Federal system in conflict with the State law. And this Federal system of bankruptcy must be a *genuine* Bankrupt Law (*Sturges v. Crowninshield*, *supra*,) or in other words, as expressed in *Ogden v. Saunders*, *supra*, the power to pass a uniform system of bankruptcy must be

actually exercised, and the State law must be in conflict with it in order to render the latter inoperative. The question, therefore, logically arises, does the present Federal Bankrupt Law actually provide for involuntary proceedings against farmers? And the answer must be that it does not, but the answer of the defendant goes further and necessarily must do so in order to save his case. He says it is true that while this class is not included and is expressly excepted, from the involuntary feature of the system, yet it is included in the voluntary feature, and therefore, it is within the *scope* of the national system. We cannot approve of this method of reasoning, not only because it would seem to be a 'contradiction in terms to say that cases excepted from the operation of the most important part of the Act are included in its scope,' but because it would seem to involve the proposition that the Federal power can render inoperative the State Insolvent Laws applicable to involuntary insolvency without establishing a genuine bankrupt law to take the place of the State law. As we have already seen, it has been held from an early day, that it is only to the extent that Congress has *actually* legislated upon the subject that the statutes of the several States are suspended by its legislation. How then can it be said that a failure to legislate, in other words that an express exclusion, raises a conflict? But without pursuing this question further it seems to us that the position taken by the defendant must necessarily lead to the conclusion that if the Congress of the United States can by including this class in the voluntary part of the system and excepting it from the involuntary part withdraw *it* from the operation of our State Insolvent Law, it can do the same in regard to any two or more classes, as for instance merchants, traders, and corporations, and the result would be that in spite of the failure on the part of Congress to establish a Bankrupt Law, that is to actually exercise the power conferred by the Constitution to pass a genuine Bankrupt Law, State legislation would become inoperative and creditors would be deprived of a remedy to which, as was said in *Geery's Appeal, supra*, they are fairly entitled.

“But it was forcibly argued on the part of the defendant that sec. 72, sub-sec. (b) of the Bankrupt Act of 1898, shows that it was the intention of Congress to substitute that Act for *every* provision of *every* insolvent law of the several States. It provides as follows: ‘Proceedings commenced under State insolvent laws *before* the passage of this Act shall not be affected by it.’ To sustain their view the case of *Parmenter Manufacturing Co. v. Hamilton*, 172 Mass. 178, decided in 1898 was relied on. But all this case decides is that the Federal Act deprives the State Court of jurisdiction to entertain jurisdiction in insolvency proceedings filed after 1st July, 1898, when the Federal Act went into force. Or as the court said: ‘The Act is to go into full force and effect upon its passage. That is to say, the rights of all persons, *in the particulars to which the Act refers*, are to be determined by the Act from the time of its passage.’ After mentioning a number of the rights which are determined by the Act, the opinion continues: ‘These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the States, and perhaps different from those found in the laws of any State, and they supersede *all conflicting provisions*.’ In the concluding part of the opinion the distinguished Judge who has recently been appointed Chief Justice of the Supreme Judicial Court of Massachusetts, said that the language of sec. 72, sub-sec. (b) ‘was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the Act,’ but necessarily this language means only that all *conflicting* provisions of the State law were thus superseded, for this is the well-settled proposition which he had just announced in a preceding sentence, and which we have quoted above. If therefore, we are correct in the conclusion already reached that there is no conflict between the provisions of our insolvent law and the present Bankrupt Law, it follows that the language of sec. 72 relied on by the defendant can have no influence upon our conclusion in this case.

"But, again, it was urged that there is a distinction between this case and cases which arose under laws which did not include *the class* within its scope, as for instance, where the Bankrupt Act applied only to debtors whose debts exceeded \$300. It was held in *Shepardson's Appeal, supra*, that in cases where the debts were less than \$300 the State law was not suspended, and debtors of that class could be proceeded against under State laws. But the true rule was laid down by Chief Justice Marshall in *Sturges v. Crowninshield, supra*, that the power of the State continues to exist over such *cases* as the Federal law does not reach. And, therefore, if cases involving involuntary proceedings against a class are not provided for by the Federal law, such cases are within the reach of the State law in spite of the fact that the members of this same class may avail themselves of the voluntary feature, otherwise the rule laid down by Chief Justice Marshall would have to be changed so as to read that the power of the State exists only over such cases as are against natural persons or corporations not within *any class* provided for by any provision of the Federal law. If this were the rule, then, of course, it would follow as contended that the defendant, being of the class called farmers, and the Bankrupt Act having provided he may avail himself of the voluntary feature, no case *against him* could be reached by the State law. But in our opinion this is not the proper view, for as we have already said it is not within the power of Congress to render inoperative the involuntary feature of State insolvent laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the State laws as to involuntary insolvency would become inoperative by the mere existence of the power of the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere *existence*, but the *exercise* of the power to establish a *genuine* bankrupt law in conflict with the State laws, which renders the latter inoperative. *Sturges v. Crowninshield, supra*.

"In conclusion, it may be proper to say that if it is the

policy of our State to render farmers and tillers of the soil, like other persons subject to the involuntary system of our insolvent laws, as it is declared to be by the provisions of our Code, Art. 47, secs. 22 and 23, we should not by any strained construction of an Act of Congress, or by a course of ingenious reasoning, attempt to thwart this purpose.

"From what we have said, it will be seen that we are of opinion that the order appealed from should be reversed."

(4) For the foregoing reasons the respondent's motion to dismiss must be denied.

We next proceed to the consideration of the constitutional questions certified to us as aforesaid. Are the provisions of Gen. Laws, 1909, cap. 339 in conflict with U. S. Const. Art. I sec. 10, and R. I. Const. Art. I, sec. 12, in that they impair the obligation of contracts? The particular portions of the statute claimed by the respondent to be so obnoxious are secs. 28, 37, 39 and 50, which respectively read as follows:

"Sec. 28. Debts of and judgments against the insolvent may be proved and allowed against the estate, which are owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest on such as were not then payable and did not bear interest; also any claims against the insolvent which may be liquidated after the filing of the petition, and growing out of any contract or promise, absolute or contingent, express or implied, whether the breach occurred before or after the commencement of proceedings in insolvency, or growing out of the rejection by the assignee of the privileges of an unexpired contract, or growing out of trover, replevin, or any tort, less any costs incurred or interest accrued after the filing of the petition; also any debts or judgments which are a fixed liability, as acceptor or drawer, indorser, surety, bailor, or guarantor, on any note, bill, bond, specialty, or contract, or for the debt of another. Claims not mentioned in this section shall not be provable against the insolvent estate."

"Sec. 37. The court or register shall, by an instrument under its or his hand, assign and convey to the assignee all the estate, real and personal, of the debtor, except such, other than bills of exchange and negotiable promissory notes, as is by law exempt from attachment, and all his deeds, books of account and papers relating to his property conveyed, which instrument shall operate to convey all said property of such insolvent in this state. Such deeds, books of account and papers, after discharge is obtained or composition effected, shall be returned to such debtor. Every insolvent shall execute to his assignee conveyances of all his property in any other state or territory of the United States, in the District of Columbia, or in any foreign country. If such conveyance be not made within twenty days after the appointment of the assignee, then the creditors at a creditors' meeting may elect to have his property in this state distributed under this chapter, but in such case said debtor shall not be entitled to a discharge; or they may apply to the court for an order upon such insolvent for such conveyance, which order, if not complied with, may be enforced by proceedings in contempt." . . .

"Sec. 39. The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed at the time of the first publication of the notice of the adjudication, in case of voluntary proceedings, and at the time of the first publication of notice of the filing of the petition in case of involuntary proceedings, and shall be effectual to dissolve any attachment, any levy, and any lien placed upon his property in fraud of his creditors not more than four months prior to the time of the first publication in either case aforesaid. The assignment shall also vest in the assignee all property conveyed not more than four months prior to the first publication in either case aforesaid by the debtor in fraud of his creditors or in fraud of this chapter, all property conveyed by an assignment for the benefit of creditors made not more than four months prior to the time of the first publication afore-

said, and all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate. The assignee may, with the approval of the court, on ex-parte application therefor, redeem all mortgages, conditional contracts, pledges, and liens of or upon any goods or estate of the debtor, or he may sell the same subject to such mortgage or other incumbrance; and if a mortgage hereafter given is foreclosed, pending proceedings in insolvency and before the appointment of an assignee, or within sixty days thereafter, the assignee, when appointed, may, with like approval, redeem the same at any time within sixty days after the appointment, with rights similar to those provided by law for the redemption of mortgages before foreclosure." . . .

"Sec. 50. A discharge in insolvency shall release an insolvent from all his provable debts due to citizens of this state, and from all his provable debts due to all other persons who shall become parties to the proceedings by proving their claims as herein provided, except to such as have priority as provided in section fifty-eight of this chapter."

The respondent Mowry claims that the obligation of his contract with the respondent Smith is impaired by the foregoing provisions of the statute in question. The following extracts from his answer to the bill in equity and from his statement of the constitutional questions, which answer and statement were filed in the Superior Court on the same day, contain all the information submitted to us upon the subject. Paragraph 3 of the answer reads as follows: "3. This respondent further answering says to the 3rd, 4th, 5th and 6th paragraphs of the complainant's bill, that on or about the 30th day of September, A. D. 1909, said Clarence A. Smith conveyed said real estate described in the 3rd paragraph of complainant's bill by deed to respondent Marquis D. L. Mowry and also on or about the 30th day of September, 1909, transferred by deed the moneys deposited with the Industrial Trust Co. to Marquis D. L. Mowry and

further says on, to wit, the 5th day of January 1907, James N. Smith, guardian of the person and estate of Hope T. Williams sued out of the Superior Court for Providence and Bristol Counties a writ of attachment wherein this respondent, Clarence A. Smith was made defendant and said writ was served by attachment of real estate described in the 3rd paragraph of the complainant's bill and said moneys deposited in the Industrial Trust Co. were attached by garnishee process upon said writ, said writ was returned to and the writ and declaration entered in said cause in said court on, to wit, the 21st day of January, 1907, said cause being numbered 22484. Hope T. Williams died on, to wit, the 28th day of February, 1907, and left a last will and testament which will was duly proved and said James N. Smith was appointed executor in said will and he accepted said trust and on the day of entered his appearance of said case as such executor against said Clarence A. Smith, in which suit the respondent Mowry was attorney for said respondent Clarence A. Smith in said Superior Court and such proceedings were had in such case, it was continued from time to time, it was carried to the Supreme Court on defendant's exceptions, *etc.*, that on June 11, 1909, the exceptions were overruled in the Supreme Court, and case was remitted to the Superior Court by direction of Supreme Court as of May 6, 1909, judgment on the verdict for plff. for \$4,578.36, debt and costs \$45.95, was entered in Superior Court, and thereafterwards, to wit, on the day of June, 1909, execution was taken out of said Superior Court by said executor James N. Smith upon said judgment and placed in the hands of Samuel Gardiner a deputy sheriff for service and said Gardiner made service of said execution upon the real estate described in the 3rd paragraph of complainant's bill, being the same real estate taxed (attached) on the writ of January 5th, 1907, and said deputy posted up notices and advertised said land for sale on the 9th day of October, 1909 at 12 o'clock noon at a public auction held in the office of said sheriff for the County of

Providence, in pursuance of said notices and advertisements for sale, he sold said land to Caroline E. Smith the highest bidder therefor at said sale, for the sum of seven hundred (700) dollars and this respondent is informed said deputy received said money, and gave said Caroline E. Smith sheriff's deed of said land so attached being all right, title and interest in the land so attached and sold to said Clarence A. Smith which said conveyance to said Mowry respondent of said land so attached and sold was made subject to said attachment on said writ dated the 5th day of January 1907 and attached long before said chapter 399 in the general laws was passed in settlement of legal services rendered by said Mowry, attorney for Clarence A. Smith according to the statements filed in this case on the constitutional questions in said case raised long before said cap. 399 was passed and the said respondent Mowry avers that he did not receive said conveyance of said land from said Smith with any intention or purpose on his part to aid or assist said Smith to hinder, delay or defraud his creditors, or either or any of them, and did not receive said conveyance of said land from said Smith for the purpose of becoming and knew not that he then was or now is a preferred creditor of said Smith and that the said respondent Mowry at the time of taking and receiving said transfers, conveyances and assignments of said real estate and money knew not, had no reason or cause to know or believe said Clarence A. Smith was an insolvent, or was acting in contemplation of insolvency, and denies that said transfer, conveyances and assignments were by said Smith made to said Mowry with the intent to delay, hinder and defraud his creditors or either of them or with the intention and purpose of preferring said Mowry as a creditor." And the statement of constitutional questions hereinbefore referred to contains the following: "Second. That such law perhaps is valid to discharge only as it refers to contracts made after the law was passed, but it makes no distinction in this respect, it purports expressly to discharge and release debts existing at the time the law was passed and took effect,

and debts and contracts *both executed and executory, express or implied made and existing before and at the time said law was passed*, and it makes no provision for a jury trial in the matter of the discharge and release of such contracts, whether made before or after the law was passed, and it is retrospective in its operation.

“Third. Said conveyance of the real estate described in the plaintiff’s bill, in the third section thereof and the transfer of the money deposited with the Industrial Trust Company, mentioned in said section of said bill as conveyed and transferred by said respondent, Clarence A. Smith, to said Marquis D. L. Mowry, respondent, on the 30th day of September, 1909, was in pursuance of a settlement made on or about the 19th day of June, A. D. 1909, for legal services rendered and specified in the statement hereto annexed by said Mowry for said Clarence A. Smith, legal services rendered and performed before such law was passed, and in the performance of contracts made long before said cap. was enacted, May 26, 1908, and in the completion of contracts for legal services entered into for said Smith by said Mowry before said May 26, 1908.”

“Fifth. Which said cap. 339 and said sections 28, 37, 39 and 50 of said cap. are inconsistent with, in conflict with and repugnant to said sections of the constitution of the United States and the State of Rhode Island, hereinbefore mentioned in this, that it impairs the obligation of contracts, and such cap. and sections are retrospective if under its operation such conveyance and transfer of property, real and personal, may be set aside, and discharge and release contracts completed and contracts entered into before and being performed when it was enacted, and whether said claims are proved or not as specified in said act.”

“Sixth. The conveyance of Clarence A. Smith of the real estate mentioned in the fourth paragraph of the complainant’s bill and the assignment and transfer by said Smith to said Marquis D. L. Mowry of the money deposited with the Industrial Trust Company, said real estate being described

in the 3rd paragraph of the complainant's bill and said money so deposited being therein specified in said 3rd section."

And in the seventh paragraph he states that about June 19, 1909, said Smith was indebted to him in the sum of \$2,000.00 for professional services rendered to said Smith, beginning in August, 1904, and continuing from thence to the first mentioned date, and he has appended an itemized statement of his bill, together with a copy of the statement of his claim made by Clarence A. Smith in his schedule and list of creditors as follows: "3. Marquis D. L. Mowry, N. Smithfield, R. I. \$2,000.00 (He has already received payment by conveyance of real estate, viz. farm at 756 Greenville Ave. Johnston, R. I. and also tract of land about half a mile away. But if such conveyance should be set aside I would owe him the above amount)."

From the foregoing excerpts we are led to infer that the contract entered into by the respondents Mowry and Smith in August, 1904, was the ordinary contract of attorney and client, in which the former was engaged by the latter to perform legal services for which the latter was to pay a reasonable compensation. It is unlikely that the parties to the contract at that time could have foreseen or anticipated the amount or the value of the services to be performed and rendered in the five years that were to ensue. It does not appear and the claim is not made that the contract was in writing, nor does it appear that there was any agreement or understanding that payment for the services to be rendered was to be made in land, which agreement would be void unless it was in writing, signed by the party to be charged, or in any specific article or out of any particular fund. Moreover, it does appear, in the third paragraph of the statement of constitutional questions, that the conveyance of the real estate and the transfer of the money on deposit from respondent Smith to respondent Mowry on or about September 30, 1909, was done in pursuance of a settlement made on or about June 19, 1909, for the legal services aforesaid. If it is claimed that the contract, whereof the obligation is said to be

impaired by the provisions of the statute under consideration, is the contract of settlement made in June, 1909, then the sufficient answer to such claim is that the statute was in force at the date of such settlement and entered into such contract as part of the existing law. How the statute operates to impair the obligation of any contract existing between said Mowry and Smith is not apparent. It nowhere appears that Mowry agreed to wait for payment for his services until the conclusion of the litigation. It does appear that his services consisted in defending Smith against law suits that were brought against him for misappropriation of funds, and that he was not attempting to collect a debt or to recover damages for Smith, in which circumstances he might have hoped to recover a sum out of which his services could be paid. If he had exercised due diligence in the collection of his charges against Smith from time to time as they arose, they would not have accumulated to the amount of two thousand dollars. The value of his contract with Smith may have been impaired by his own good natured neglect, but the obligation of the contract remains unimpaired by the statute. We are therefore of the opinion that the statute does not conflict with either the constitution of the United States or that of this state in respect to the impairment of the obligation of said contract. Neither does it appear to be retroactive in respect to the case under consideration.

- (5) The remaining constitutional question to be considered is whether said insolvency statute violates the provisions of Art. XIV of Amendments to the U. S. Constitution or of R. I. Const. Art. I, sec. 10, in causing the respondent Mowry to be deprived of his property, without jury trial and contrary to the law of the land. It does not appear in these proceedings how any such dire result is to be apprehended nor how it may be accomplished. The present suit is a direct attempt to reach property held and claimed by the respondent Mowry, but therein a jury trial may be had upon any issue of fact; and certainly a suit in equity brought to recover

property alleged to have been conveyed in fraud of creditors is and long has been recognized as being an appropriate proceeding for that purpose in the law of the land.

Our answer to the constitutional questions raised by the respondent Mowry is that the provisions of Gen. Laws, 1909, cap. 339, hereinbefore referred to, are not in conflict with the provisions of U. S. Const. Art. I, sec. 10, nor with those of Art. XIV of the amendments to the same. Neither do they conflict with the Constitution of R. I. Art. I, secs. 10 and 12.

Having thus decided the constitutional questions certified to us, the papers in the case with our decision certified thereon are sent back to the Superior Court for further proceedings.

James Harris, Irving Champlin, for complainant.

M. D. L. Mowry, for respondent.

HUNTER C. WHITE vs. LYDIA F. ALMY, Admx.

MARCH 9, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Probate Law. Filing Claims Against Estate. Actions. Quantum Meruit.*
Gen. Laws, 1909, cap. 314, § 3, providing for the filing of claims against decedents in the probate court, does not require the setting forth of the evidence to support the claim, but it is sufficient to state such sum as claimant expects to recover.

The fact that a claim filed in a probate court against the estate of a decedent, states a definite sum as due, does not prevent recovery upon a quantum meruit.

(2) *Contracts. Domestic Relations. Board.*

In an action brought by a son-in-law to recover for the board of his wife's mother, deceased, the doctrine established in this state as to contracts for services between members of a family, considered; and, *held*, there being evidence of circumstances and statements from which the jury might infer that there was a reasonable and proper expectation on the part of both parties, that compensation was to be made, the case was properly submitted to the jury upon that point as well as upon the reasonableness of the amount claimed for board under all the circumstances.

(3) *Evidence.*

In an action to recover for board of defendant's intestate, defendant offered evidence as to money received by plaintiff from intestate. This was not offered to show payments on account but to show the relationship of the parties and the matter was also the subject of another suit between the parties to recover the money.

Held, properly excluded.

(4) *Contracts. Evidence. Domestic Relations.*

In an action between members of a family to recover for board, request to charge that the contract to pay board, not to be enforced until after death, when claimed to have been made by an aged and infirm person must be established by the strongest evidence, was properly refused, and charge that it might be established by a preponderance of the evidence was applicable to the case.

(5) *Contracts. Evidence. Domestic Relations.*

Charge approved, that the statement "you will get your pay when I am gone" of itself is not enough to overcome the presumption that services rendered by a son-in-law to his mother-in-law were rendered through affection, but might be taken into consideration with the evidence, by the jury, in determining whether plaintiff had any proper expectation of compensation.

(6) *Contracts. Evidence. Domestic Relations.*

Where there was evidence if believed by the jury, that intestate intended and promised plaintiff that he should be paid after her death for services rendered it was unnecessary for plaintiff to notify intestate of his intention to charge her for such services, and request to so charge was properly refused.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action on the case to recover the amount of the plaintiff's claim for the board of Lydia Kelton, the defendant's intestate, and certain sums of money paid by the plaintiff for said intestate. The following is a copy of the claim filed in the probate court of Burrillville.

"BURRILLVILLE, R. I. Dec. 20, 1909.

Estate of Lydia Kelton

To Hunter C. White, Dr.

To board of Lydia Kelton from March 16, 1903

to September 7, 1908, 286 weeks, @ \$5.00

per week \$1,430 00

To board of Lydia Kelton from September 7, 1908 to May 17, 1909, 36 weeks @ \$7.50 per week.....	270 00
To payment of Dr. Bruce, medical attendance..	4 00
To payment for nursing.....	17 00
To payment for minister attending funeral....	10 00
	<hr/>
	\$1,731 00"

This claim having been disallowed by the administratrix, this suit was duly prosecuted thereon, within the time prescribed by law.

The defendant pleaded the general issue and the statute of limitations; there was no evidence offered in support of the latter plea; the case was tried upon the plea of the general issue, in the Superior Court, before a jury on the second and third days of February, 1911; the plaintiff recovered a verdict for \$1,224.19.

Within seven days after the rendition of said verdict, the defendant made a motion for a new trial on the following grounds: "1. That said verdict is against the law. 2. That said verdict is against the evidence. 3. That said verdict is grossly excessive. 4. That said verdict is against the weight of the evidence. 5. Because of evidence newly discovered since the trial of said case."

After the denial of said motion for a new trial, the defendant filed a bill of exceptions which, after amendment, was allowed in part; and the case is now before this court upon said bill of exceptions as allowed.

It appears in evidence that Lydia Kelton was the mother of Mrs. White, the plaintiff's wife, and was also the mother of Mrs. Almy, the defendant administratrix, and of one son, Nahum A. Kelton; that Lydia Kelton, being a widow since 1889, had at times lived with Mrs. White and at times with Mrs. Almy, and at other times (in the summer) in a house at Riverside, R. I.; that in the summer of 1902, she was visiting her daughter, Mrs. White, at her home on the farm in Burrill-

ville, and while there fell and injured her hip, whereby she became partly disabled and was unable to walk thereafter without the use of a crutch. In the fall of 1902, upon the approach of cold weather, it became necessary for Mrs. Kelton to have an abode other than at said farm, because the house was not properly heated for cold weather, and could not be made suitably comfortable for the care of Mrs. Kelton; that Mr. and Mrs. White did not live at the farm in the winter of 1902-1903, they were taking their meals out, and had no room for Mrs. Kelton where they lived in the city. In view of these conditions, application was made to Mrs. Almy to allow Mrs. Kelton to live with her, but, as testified by Mr. Almy, it was impossible for them to have Mrs. Kelton at his house, partly on account of the ill-health of his wife and partly because they had no coal to heat their house, the winter of 1902-1903 being the winter of the coal strike. Her son, Nahum A. Kelton and his wife lived in a tenement of small rooms heated by stoves, and arrangement was finally made for Mrs. Kelton to go there, where she stayed until they were unable to keep her there any longer. During her stay at her son's house, Mrs. Kelton frequently requested Mrs. White to take her to the farm at Burrillville, and Mrs. White assured her that she would do so just as soon as it was warm enough to be safe to take her up there. Mrs. White communicated her mother's request to the plaintiff, who consented that his mother-in-law should come to his house to live; and finally, on March 16, 1903, in accordance with her own desire and request Mrs. Kelton went to the house of her daughter and son-in-law to live, and remained there till her death, May 17, 1909. It further appeared in evidence that during all this time Mrs. Kelton was well treated and cared for, had her meals with the family or in her own room when necessary, was furnished with the best of food and with such things as she asked for other than such as were provided for the family; that she was pleased with what she received and repeatedly said to the plaintiff, in the presence of others, "You are going to get paid for all these-

nice things you are doing for me after I am gone," or words to that effect, as testified to by several witnesses, one being her daughter, Mrs. White, one her grandson, the present plaintiff, and one a Mrs. Palmer, who visited at the Whites' house frequently and for considerable periods from 1906 to 1909. It also appears that in March, 1907, when an addition was built to the house, a balcony on the second floor conveniently accessible to Mrs. Kelton's room was glazed to make a sun-parlor for Mrs. Kelton's use and a steam radiator placed therein to warm the same when necessary, and that she constantly used the sun-parlor thereafter as long as she was able.

It is to be noted that the claim made by the plaintiff upon which suit is brought, is simply for board. No claim is made for special care or nursing, on the part of the plaintiff or his wife, or for money expended for luxuries or for special steam heat or otherwise (except for the three final items of the claim which are not disputed). And the only proper bearing of such testimony on behalf of the plaintiff, as relates to such special care or nursing or expenditure, is such as it may have in the minds of the jury in determining whether the amount claimed for board in view of all the testimony as to the kind and quality of board furnished was reasonable, and whether under all such circumstances as are shown to have contributed so much to the comfort, welfare and happiness of Mrs. Kelton during her last years, it was reasonable to believe that in expressing her gratitude and satisfaction, she understood and intended that she or her estate should pay a reasonable sum for what her son-in-law was doing for her. That he expected her to pay such reasonable sum can now be inferred only from her expressions above quoted and from the fact that he duly filed his claim and brought his suit thereon; since, owing to his death before the case was tried, his testimony became unavailable. Mr. Almy testifies that about two weeks after Mrs. Kelton died the plaintiff told him he had no claim; and further testifies that Mr. White did not file his claim until after a contest in the probate court, as to whether

Mrs. White or Mrs. Almy should be appointed administratrix, which resulted in the appointment of Mrs. Almy, the defendant. And thereupon the defendant argues that there is evidence to show that Mr. White did not, during the lifetime of Mrs. Kelton, have any reasonable expectation of being compensated, or any intention of making any such claim; and that the making thereof was an after-thought.

(1) The defendant contends that under the evidence the court below erred in refusing to direct a verdict for the defendant (exception 29), and having so refused, that it erred in denying the motion for a new trial (exceptions 1-7) because there was no evidence upon which the case should have been submitted to the jury, or upon which the verdict of the jury can be supported. In support of these exceptions the defendant argues that "The claim as filed in the office of the clerk of the Probate Court of Burrillville does not show a subsisting liability in favor of the claimant and against the decedent; but when taken in connection with the relationship of the claimant and decedent showed on its face that no liability existed. It is based so far as appears on its face, upon the implied promise the law infers from the rendition of valuable services by one person for another, and as between strangers would have shown a subsisting liability; but no such liability is implied between parent and child." . . .

"The presumption being that such services are gratuitous there should have been set out in the claim filed either an express promise to pay for such services or circumstances affording ground for a reasonable expectation on the part of the plaintiff that compensation was to be made.

" 'It is the claim as presented which goes before the commissioners or the court. No provision is made for the determination of any question not embraced in the claim as originally presented.' *Anderson v. Williams*, 26 R. I. at page 67.

"The claim as filed in the Probate Court sets out a claim for board for a definite number of weeks at a definite sum per week, amounting to a definite sum and contains no statement

that any other claim would be made. The plaintiff when a bill of particulars was demanded filed as such bill a certified copy of the claim filed in the Probate Court. The declaration contains no count for so much as such services are reasonably worth, but apparently relies upon a promise expressed or implied to pay the claim as presented.

"It is respectfully submitted that there is no evidence to support such promise."

We are unable to agree with these contentions. To do so would be to hold, that when a claimant, under our statutes, files his claim against the estate of a deceased person, he must set forth the nature of the evidence upon which he expects to support such claim. The statute (Gen. Laws, 1909, cap. 314, sec. 3), simply provides that claimants "shall file statements of their claims in the office of the clerk of the probate court." The nature of the evidence upon which the claimant may attempt to support his claim is properly left to be revealed in case of a contest at the time of the trial. There is nothing upon the face of this claim to show that there was any family relationship between the claimant and the deceased, or that there arises any such presumption, as claimed, that the services, being rendered as between parent and child, were gratuitous. The claim as filed is equally consistent with a recovery, either upon a contract express both as to the obligation to pay and as to the precise amount to be paid, or upon an express contract or understanding that payment of a reasonable amount should be made, or upon a contract to be implied in law from the nature of the services rendered and of the circumstances under which they were rendered. The claim simply sets forth and should set forth such definite sum as the claimant hopes and expects to recover. As was said by this court in *Anderson v. Williams*, 26 R. I. 64, at p. 66: "While we should hesitate to apply the bar of the statute to a claim which had been substantially made, though lacking in technical exactness of statement, or to a claim which omitted to state unliquidated damages, yet we cannot concede the right of a creditor who

has stated a claim for a definite sum of money, for services rendered in a definite period of time, to sue for other services rendered outside of that period or for an amount of money greater than that originally claimed.

"A reasonable time is given to creditors to present their claims, but when that period has expired the executor has the right to regard the claims which are filed as constituting the maximum indebtedness of the estate and to deal with it accordingly. He is required within thirty days after the expiration of the time for filing claims to file his statement allowing or denying the validity of these same claims—Pub. Laws, cap. 864—and if commissioners are appointed or suit is brought, it is the claim presented which goes before the commissioners or the court.

"No provision is made for the determination of any question not embraced in the claim as originally presented. If one creditor may increase his claim, so may all; and an executor who has funds sufficient to pay the claims as originally filed may be seriously embarrassed from beginning to settle the estate as solvent and finding later that it is insolvent.

"The object of the statute is to facilitate the settlement of the estates of deceased persons and to make all the prescribed steps towards the distribution of the estate conclusive when they have once been taken."

It is nowhere intimated in this opinion that the claimant cannot recover anything unless he proves himself to be entitled to the exact sums of money set forth in his claim, nor is it in any way suggested that he must set forth the evidence upon which he expects to recover, otherwise than as the nature of such evidence may be inferred from such statement of the claim, as would make the same definite and intelligible. The point of the decision is that the claimant cannot recover more than he has claimed, or for a claim of a different character from the claim as presented to the probate court.

As this court said in the recent case of *Hobin v. Hobin*, 33 R. I. 249, at page 266: "Appellants contend very earn-

estly that appellee must prove an 'express contract.' That is true in the sense that she must prove a promise to pay, but not true in the sense evidently insisted upon that she must prove a promise to pay certain sums at certain times for certain services. The only obstacle peculiar to such a case is, that the law does not imply a promise by a parent to pay for his child's work. The child must prove a promise to pay.

" 'Thus where an adult child resides with and performs valuable service for the parent an understanding may be shown between them of recompense either in money or by way of testamentary provision under the parent's will. In meritorious instances, and particularly when the parent was long sick and infirm, and the child or some particular child performed indispensable functions, or where by personal labor or skill the child enhanced the value of the parental estate, a mutual intention to this effect may be inferred from the circumstances and where from some consistent cause no such testamentary provision has been made compensation will be allowed, out of the deceased parent's estate upon the usual footing of a creditor's claim.' " Schouler Dom. Rel. sec. 274, p. 442.

- (2) " 'When the relation of parent and child exists the law will not readily assume that of debtor and creditor likewise; and board and services may constitute a fair, mutual offset in the general household. But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract to that effect; an implied contract being proven by facts and circumstances which show that both parties, at the time when the services were performed, contemplated or intended pecuniary recompense.' Schouler, sec. 269, p. 432.

"In *Fuller v. Mowry*, 18 R. I. 424, the court says (p. 426): 'The defendant argues that though the law implies a promise to pay for services rendered and voluntarily accepted, yet when the services are rendered by members of a family living together in one household to each other, no such

implication arises; for the reason that where the household family relation exists, reciprocal acts of kindness which tend to promote the comfort and convenience of the members of the household are presumed to have been rendered disinterestedly, from mere affection or good will; and, hence, that a plaintiff who sues for such services, to recover, must show affirmatively an express promise of remuneration. Doubtless this argument is sound, so far as it goes, but the principle contended for is subject to the further qualification that if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, the plaintiff will be entitled to recover.'

"In *Newell v. Lawton*, 20 R. I. 307, 308, the court in sustaining a nonsuit, say: 'The evidence shows no express agreement on the part of testatrix to pay for these benefits, nor circumstances affording ground for a reasonable expectation on the part of plaintiff that compensation was to be made.'

"In *Brown v. Cummings*, 27 R. I. 369, the plaintiff had not lived with deceased before the services, but the court say, p. 370, 'If she was a member of his family at that time, then the circumstances in which the services were rendered should have been submitted to the consideration of the jury for their determination as to whether they do or not show a reasonable and proper expectation that compensation was to be made.'"

See, also, in support of the same general doctrine,—2 Page, Contracts, p. 1192 and note 16: *Murrell v. Studstill*, 104 Ga. 604; *Neish v. Gannon*, 198 Ill. 219; *Warren v. Warren*, 105 Ill. 568; *Morton v. Rainey*, 82 Ill. 215; *Jones v. Adams*, 81 Ill. App. 183; *Collins v. Williams*, 21 Ind. App. 227; *Ridler v. Ridler*, 103 Ia. 470; *Gorrell v. Taylor*, 107 Tenn. 568; *Westcott v. Westcott*, 69 Vt. 234; *Broderick v. Broderick*, 28 W. Va. 378; *Spencer v. Spencer*, 181 Mass. 471.

We are of the opinion that the case at bar falls within the principle of the cases last above cited; that there was

evidence before the jury of circumstances and statements from which the jury might infer that there was a reasonable and proper expectation, both on the part of the plaintiff and of the deceased, that compensation was to be made, and that the evidence upon that point was conflicting, as above shown, and was properly submitted to the jury; that the question of the reasonableness of the amount claimed for board under all the circumstances was also a proper question to be submitted to the jury; we are therefore of the opinion that the case was properly submitted to the jury, and that there was no error in the court's refusal to direct a verdict for the defendant; the defendant's exception 29 is accordingly overruled.

A careful consideration of all the testimony in the case also leads this court to the conclusion that there was no error in the court's denial of the motion for a new trial. In our opinion there was evidence, which was conflicting, upon the main point of controversy in the case, which was properly submitted to the jury, as above shown. We cannot say that the evidence preponderates in favor of the defendant, or that the jury were not warranted by the evidence in finding for the plaintiff, under the doctrine of our own cases, as hereinbefore set forth. "There is nothing to show that the jury were governed by any improper motives or that the judge erred in the performance of his duty," in his refusal to grant a new trial. *Wilcox v. R. I. Company*, 29 R. I. 292, 296. The exception which relates to the claim that the amount awarded was excessive (No. 3) is not specially argued or pressed; but it appears that the jury awarded considerably less than the amounts set forth in the claim, viz., less than \$4 per week on the average for the whole time covered, or, if interest was figured, more than \$500 less than the total amount claimed. In view of all the testimony we do not find the amount awarded excessive. Exceptions 1-7, inclusive, to the refusal to grant a new trial, are overruled.

The remainder of the defendant's exceptions relate to exclusions and admissions of evidence, and refusals to charge as requested.

Exception 8, p. 20, Q. 92. The defendant excepted to the ruling of the court excluding certain testimony with reference to the entertainment of guests by the plaintiff, Hunter C. White, deceased. Counsel for the defendant asked Hunter C. White, Jr., a witness for the plaintiff, in cross-examination, the following question: "Week end guests and guests to stay over night, and things of that sort?" The question was objected to after it was answered, and was ruled out; it was irrelevant and immaterial. But the substance of the inquiry was admitted without objection under later questions. The exception is frivolous and is overruled.

Exception 9, p. 28, Q. 142. The defendant excepted to the ruling of the court excluding certain testimony with reference to the accommodations furnished by the plaintiff to Lydia Kelton, the defendant's intestate, when she was stopping at the plaintiff's house many years prior to the time covered by the claim in suit. Counsel for the defendant asked Hunter C. White, Jr., in cross-examination, the following question: "When she was stopping there she had to have a special bed made up in one of the other rooms?" The question was irrelevant and immaterial and properly excluded. This exception is frivolous and is overruled.

Exception 10, pp. 47 and 48. Q. 65. In the direct examination of Carrie K. White, a witness for the plaintiff, she was asked the following question: "Prior to March, 1903, did you have any steam heat in your Burrillville house?" Answer: "No, sir, we did not. I went to my sister—I could not have mother at my brother's any longer, and we were waiting for the steam heat to be put in—It wasn't quite finished—and I asked my sister if my mother could come there." The question was not objected to, nor was any objection made until after it was answered. No motion was made to strike out the answer, or any part of it. The matter objected to may have been a reason which in-

fluenced the witness and the plaintiff to consent to her mother's coming to live with the plaintiff. The testimony was properly admitted to show the circumstances and the considerations which led up to the final arrangement. The exception is overruled.

Exception 11, p. 55, Q. 109. Counsel for the defendant, in cross-examination, asked said witness the following question: "And whenever you went to the station, you took a carriage?" Objected to and excluded. The question was irrelevant and immaterial and was properly excluded. The exception is overruled.

Exception 12, p. 60, Q. 136. Counsel for the defendant, in cross-examination, asked said witness the following question: "And from time to time did Mr. White get any of that money?" Answer: "He never received a cent—." Objected to and excluded. The answer is stricken out. A reference to question 134, page 59, shows the nature of the inquiry. Question 134 is as follows: "Do you know how much money Mrs. Kelton had when she went living with you?" The question was objected to and excluded, and no exception thereto appears in the bill of exceptions. The matter inquired of was not in proper cross-examination of any previous testimony of the witness: it was irrelevant and immaterial, and was properly excluded. The exception is overruled. (See exception 19.)

Exception 13, p. 61, Q. 140. Counsel for the defendant, in cross-examination asked said witness the following question: "Wasn't money received by Mr. White from Mrs. Kelton from time to time while Mrs. Kelton was there?" Objected to and excluded. The question was objectionable since it was not limited to the matter in suit. (See exception 19.)

Exceptions 14, 15, 16, 17 and 18 were disallowed.

Exception 19, pp. 68-71. Counsel for the defendant made the following statement to the Court: "May it please the Court, we expect to show, and the purpose of the questions asked of Mrs. White that were ruled out was to show, that

Mr. White, Hunter C. White, October 5th, 1903, received of Lydia Kelton, his wife's mother, \$1,000.00; April 1st, 1904, he received \$200.00; August 16th, 1905, he received \$200.00; November 4th, 1905, he received \$50.24; January 14th, 1907, he received \$50.00, none of which has been repaid by Hunter C. White to Lydia Kelton. THE COURT: What do you mean by 'received?' MR. WATERMAN: Just what I say, that he received it. THE COURT: Received for what purpose? A man may receive money from another person and never have to repay it. It may be a gift, or it may be received by him to pay some bills, or it may be received by him to transfer it over to somebody else, or to invest for some other person. Qualify the word 'receive.' MR. WATERMAN: I desire to finish my statement. What is the last I said. (record read) MR. WATERMAN: During her lifetime, or to her representatives since her decease. All this money was received from moneys belonging to Mrs. Kelton." . . . "All this is offered for the purpose of showing the relationship." . . . "It is offered for the purpose of showing the relationship between the parties; (3) how much money Mr. White actually did receive, and to find out what it is claimed he received it for." . . . "THE COURT: All these moneys are subject to another suit brought by Lydia Kelton against Hunter C. White? MR. ALMY: It will appear in another suit, your honor." . . . "MR. CHAMPLIN: There is another suit pending. MR. ALMY: I have heard it said that you cannot try one suit in the bowels of another. THE COURT: Of course you can't, and that is why I ruled out those questions. MR. ALMY: Then we take exception to it, and that is all there is to it. We are simply trying to show the relationship of the parties. It is not trying their case, it is not trying to show whether or not he owes it, but simply to show the relationship of the parties. MR. WATERMAN: I make this statement that I offer these things, what I expect to prove, or offer to prove, and take exception to their exclusion. Defendant's exception noted." . . . "THE COURT:

You do not offer to prove these things for the purpose of showing these payments were made on this claim? MR. ALMY: Not at all." The matter above quoted is self-explanatory. It was not offered to show payments, on account, to the plaintiff, Hunter C. White, deceased, by the defendant's intestate; it was not offered in set-off (no plea in set-off was filed); it was not offered, as Mr. Almy said, "to show whether or not he" (Hunter C. White) "owes it, but simply to show the relationship of the parties." Upon the basis of the offers as above set forth, if it had been admitted it would not have supported or refuted any issue in the case; and as it was undisputed that the matter offered is the subject of another suit to recover these sums of money between the same parties, now pending, it would have been manifestly improper to admit this testimony, as offered in this suit. The ruling was proper and the exception is overruled.

Exception 20, p. 98, Q. 9. Counsel for the defendant asked Charles D. Skinner, a witness for the defendant, the following question: "What was the balance due Lydia Kelton, May, 1909—what was the balance due her according to your account?" Objected to by Mr. Champlin. "MR. WATERMAN: To show the amount of the estate she had, as bearing upon the intent of the parties." Objected to and excluded. Charles D. Skinner was teller of the Industrial Trust Company, of Providence. Mr. Waterman stated (p. 97) that he offered to prove by him that he had paid Hunter C. White sums of money from the account of Lydia Kelton in said bank. "THE COURT: This is not offered to show payments of this account, or that he had money which he could apply to this account? MR. HARRIS: What is the purpose of this? I think we ought to know. They are spreading a lot of matter on the record here that is not material. THE COURT: There is no set-off, and it is not offered to show payment in set-off, or any payment on account of this claim, nor is it offered to show that this man had money he could have applied to this claim if he wanted

to." . . . "MR. WATERMAN: We don't admit it is not offered for the purpose your honor suggested. It is offered for any legitimate purpose for which it is admissible. THE COURT: You want me to charge this jury that even if this woman offered to pay board, that Hunter C. White had enough money in his hands to pay this claim if he wanted to? MR. ALMY: We are not going to ask you to charge that." It is manifest that the testimony excluded and which was the subject of this exception related to the same matters involved in the pending suit referred to in the 19th exception, and was properly excluded for the same reason. This exception is overruled.

Exceptions 22, p. 107, Q. 29. Counsel for the defendant asked Herbert Almy, a witness for the defendant, the following question: "Now, Mr. Almy, did you receive any board, you or Mrs. Almy receive any board from Mrs. Kelton during the time she lived with you?" Objected to and excluded. The question was immaterial and was properly excluded; this exception is overruled.

Exception 23, p. 111, 112. Counsel for the defendant offered to prove by said witness that Hunter C. White made a statement as to what property said Lydia Kelton had. Objected to and excluded. Exception overruled for the same reason as stated under exceptions 19 and 20.

Exception 24, p. 112, Q. 56. Counsel for the defendant asked said witness the following question: "Do you know of any money that Mr. White received at any time belonging to Mrs. Kelton, at any time since she went to board with them?" Objected to and excluded. "MR. WATERMAN: I offer to show the same facts. THE COURT: If it is for the purpose of showing payment on this claim you may show it. MR. WATERMAN: No, Your Honor." Exception overruled for the same reason as stated under exceptions 19 and 20.

Exceptions 25 and 26 were disallowed.

Exception 27, p. 122. Counsel for the defendant offered "to show that there was approximately \$2,500.00 in the

bank at the time of her" (Lydia Kelton's) "death, and a very few small items of no value." Objected to and excluded. Exception overruled, for the same reason as stated under exceptions 19 and 20.

Exception 28, pp. 123, 124, Q's 94, 95, 96, 97. All these questions related to matters concerning the amount of the property belonging to Mrs. Kelton found after her death, and as to whether any bills or receipts showing the disposition of her property were found. The matters inquired about, so far as they were excluded, related to the same matters involved in the pending suit, above referred to under exception 19, and were properly excluded for the reasons therein stated, and this exception is overruled.

Exception 29, p. 134, relating to the defendant's motion to direct a verdict has been previously disposed of and overruled; and exceptions 30 to 40, inclusive, relating to the charge of the court, or the court's refusal to charge, will be considered hereafter.

Exceptions 41-50, inclusive (51 disallowed), 52-53, relate to numerous questions asked of Mrs. White, the plaintiff's wife, in cross-examination, relating to the receipt of various sums of money by the plaintiff from Mrs. Kelton, being sums of money referred to in exceptions previously discussed and overruled, also as to the amount of property Mrs. Kelton had at her death, and also inquiring whether Mr. White had charge of the business affairs of Mrs. Kelton during the time she lived with him, or occupied fiduciary relations towards Mrs. Kelton and her affairs generally. It appeared that all these matters were involved in the pending suit hereinbefore referred to and the questions were properly excluded, and these exceptions are overruled.

Exception 54, p. 68, Q. 163. Counsel for the defendant, in cross-examination, asked Mrs. White the following question: "Did you ever tell Mrs. Almy that your mother was paying board at any time?" Objected to and excluded. The question is immaterial and irrelevant, and is not properly

in cross-examination; it was properly excluded, and this exception is overruled.

Exception 54½, p. 100, Q. 6. Counsel for the defendant, in direct examination, asked Edward H. Chesebro, a book-keeper for the Rhode Island Hospital Trust Co., the following question: "And I will ask you whether or not your company with which you are connected paid to Hunter C. White on the 5th day of October, 1903, a thousand dollars of the account standing upon the books of the company in the name of Lydia Kelton?" This question was in the same line of inquiry already discussed under exceptions 19 and 20, was properly excluded, and this exception is overruled.

Exceptions 55-56 relate to questions asked of the same witness in the same line of inquiry, and are overruled for the same reasons.

Exception 57, p. 116, Q. 70. Counsel for the defendant, in direct examination, asked Herbert Almy the following question: "Did she" (Lydia Kelton) "make any statement in regard to making any payments, or about persons being compensated or paid for what they did?" Objected to and excluded. A reference to the transcript, commencing at question 64, page 114, will show an attempt upon the part of the defendant to adduce testimony as to statements or admissions of her intestate, not made in the hearing of the plaintiff, but to third persons in his absence and the question last above quoted constitutes a part of said attempt; the question was rightly excluded and this exception is overruled.

Exceptions 58 and 59 relate to similar questions addressed to the same witness, and are overruled for the same reason.

Exception 60, p. 123, Q. 94. Counsel for the defendant, in redirect examination, asked said Herbert Almy the following question: "And was there any other property belonging to Mrs. Lydia Kelton that you found, except the items of goods that Mrs. White gave you and the money in the bank?" Objected to and excluded. Overruled for the same reasons as stated under exceptions 20, 23, 27, 45 and 56.

Exception 61, p. 123, Q. 95. Counsel for the defendant, in redirect examination, asked said Herbert Almy the following question: "Were there any bills or receipts for money paid out, found by you in the estate of Lydia Kelton?" Objected to and excluded. Overruled for the same reason as last exception.

Exception 62 disallowed.

Exception 63, p. 124, Q. 97. Counsel for the defendant, in redirect examination, asked said Herbert Almy the following question: "Were there any bills or receipts for moneys paid out, so far as the son of Mrs. Kelton was concerned?" Objected to and excluded. The question is irrelevant and immaterial; exception overruled.

We come now to the exception based upon the charge to the jury and the refusal to charge upon request.

Exception 30, p. 141. 1st request. Counsel for the (4) defendant requested the court to charge the jury, "That the contract to pay board, not to be enforced until after death, especially when claimed to have been made by an aged and infirm person, is properly regarded with grave suspicion by courts of justice, and should be closely scrutinized, and only allowed to stand when established by the strongest evidence." Request denied. This request purports (as claimed by defendant's attorney) to be based upon the case of *Spencer v. Spencer*, 26 R. I. 237, which was a bill in equity to enforce a contract for testamentary disposition; and the discussion in the case related to contracts of that description. It was quite inapplicable to the case at bar, which, as above shown, is within the principle laid down in *Fuller v. Mowry*, 18 R. I. 424, 426 and *Hobin v. Hobin*, 33 R. I. 249, 257, 262; in which latter case it was expressly held (p. 262) that "the express contract for wages" (to be paid by a grandfather to his grandchild living in his family) "could be proved by a preponderance of evidence, and not beyond a reasonable doubt." The charge upon this point was in accord with the doctrine last above quoted; the first request was rightly refused, and this exception is overruled.

(5) Exception 31, p. 142. 2nd request. Counsel for the defendant requested the court to charge the jury, "That the vague statement, 'that you will get your pay when I am gone,' is not sufficient to overcome the presumption that the service was rendered through love and affection, when the service is rendered by a son-in-law to his mother-in-law, who was an aged and infirm person living in his family at the time such service was rendered." Request denied. (See following exception.)

Exception 32, p. 142. In denying the second request, the court said (p. 142): "In and of itself, gentlemen, it is not enough, but taken in connection with all the evidence in the case, you may take into consideration what it means and see if it throws any light upon the question of whether he had a reasonable and proper expectation of being compensated for board that he gave her. Mr. Waterman's exception noted to the modification of the Court." This instruction as modified was correct and in accord with the principles of the case last above cited. These exceptions are overruled.

Exception 33, p. 142. 3rd request. Counsel for the defendant requested the court to charge the jury, "That a recovery upon *quantum meruit* cannot be had when the claim filed in the Probate Court sets out a definite sum due." Request denied. The request was properly denied and this exception is overruled (See discussion of exceptions 1-7 and 29 *supra*).

Exception 34, p. 143. 4th request. Counsel for the defendant requested the court to charge the jury, "That there is no implied promise to pay for board when the board is furnished by a daughter or her husband to her mother while she is living in the family, even though the mother requested her daughter to take her to live with her." The court instructed the jury as follows: "I will strike out the word 'daughter.' There is no implied promise to pay for board when the board is furnished by a son-in-law to his mother-in-law while she is living in the family, even though

the mother-in-law requested the son-in-law to take her to live with him, there is no implied promise in and of itself. I will charge that way and not the way you have it here." "Mr. Waterman's exception noted to the modification of request." The modification made the request conform to the facts in the case at bar, and was properly given in connection with other portions of the charge and was favorable to the defendant. This exception is overruled.

Exception 35, p. 143. 5th request. Counsel for the defendant requested the court to charge the jury, "That if the son-in-law meant to charge his mother-in-law for board, he ought to have given her notice of his intention to do so." Request denied. On defendant's brief appears this statement: "The fifth request to charge was based upon the decision in *Mariner v. Collins*, 5 Harr. 290, cited in the text of Beach on the modern law of contracts, Paragraph 654 as follows: 'If the son-in-law meant to charge her therefor (board &c.) he ought to have given her notice.'" The (6) quotation is from the charge to the jury at *nisi prius*. Counsel however neglected to quote the next and concluding sentence of the charge, viz., "But if she went to Collins' without invitation, or from other facts the jury are satisfied that such was the understanding of the parties, she would be liable for food, attendance and necessaries." We find this case in line with our own cases above cited. If it be true as testified by plaintiff's witnesses, and evidently believed by the jury, that Mrs. Kelton intended and promised the plaintiff repeatedly that he should be paid after her death, there was no reason why he should have notified her of his intention to charge for her board. (See *Hobin v. Hobin*, *supra*.) The request was properly refused; and this exception is overruled.

Exception 36, p. 144. 6th request. Counsel for the defendant requested the court to charge the jury, "That the presumption of law is that such services are rendered or prompted by affection or good will." The Court said: "I have covered the sixth." "Mr. Waterman's exception

noted to the refusal of the Court to charge as requested." The presumption referred to in the sixth request was entirely and properly covered in the charge, pages 136 and 139. This exception is overruled.

Exception 37, p. 144. 7th request. Counsel for the defendant requested the court to charge the jury, that "The law does not presume a promise to pay, from the request of Mrs. Kelton to come there." Request denied, Mr. Waterman's exception noted. This was plainly included in the charge given as quoted above (Ex. 34) and this exception is overruled.

Exception 38, p. 144. 8th request. Counsel for the defendant requested the court to charge the jury, "the jury should take into consideration the fact that Mrs. Kelton never paid any board to Mr. White during her lifetime." This request was substantially granted. (See exception 40.) This exception is overruled.

Exception 39, p. 145. 9th request. Counsel for the defendant requested the court to charge the jury that, "The plaintiff in this case cannot recover for Mrs. Kelton's board unless it is proven that both Mrs. Kelton and Mr. White had a reasonable expectation that board should be paid." Request modified. (See exception 40.) The charge properly covered the request. This request had been covered. See pages 139, 140 and 141. This exception is overruled.

Exception 40, p. 145. As to the 8th and 9th requests, the Court said (p. 145): "On that question, the main question as to whether there was reasonable and proper expectation that compensation was to be made, you should likewise take into consideration the fact that during her lifetime no claim was made upon her. You should likewise consider, gentlemen, all the other facts in regard to it. I think that is all that is necessary to say. You may take the case, gentlemen, bearing in mind this, that your verdict must be for the plaintiff any way at least for \$31.00, and if you find she owed him for board, add that amount to the \$31.00, and

figure interest from December 21st, 1909, to the present time." "Mr. Waterman's exception noted to the modification of requests as made by the court."

We are of the opinion that the charge to the jury and the special instructions given, sufficiently covered all the requests, that were properly made, and this exception is overruled.

All of the defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the verdict for the plaintiff.

Irving Champlin, James Harris, for plaintiff.

Lewis A. Waterman, Herbert Almy, for defendant.

STATE vs. JOHN DE FONTI.

STATE vs. JOHN CISCO *et al.*

APRIL 3, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Indictments. Sufficiency of Accusation.*

An indictment charging defendant with manslaughter because of his unlawful sale of an intoxicating liquor, in which poison had been mixed, is insufficient without an allegation that defendant knew such intoxicating liquor was poisoned, or the allegation of facts from which such knowledge could be inferred, although his sale of the liquor was contrary to law.

(2) *Indictments. Sufficiency of Accusation.*

An indictment charging defendant with manslaughter, because of his alleged negligence in selling and delivering poison mixed with liquor, to be drunk by deceased, instead of whiskey which deceased requested, is sufficient without setting out the facts constituting the alleged negligence, or facts from which it could be inferred that defendant knew or should have known that the liquor contained the poison.

INDICTMENT. Heard on questions of law certified under Gen. Laws, cap. 298, § 5.

RESCRIPT.

The first and second questions certified to us in each of the above entitled cases are answered in the affirmative and

the third and fourth questions in each case so certified are answered in the negative and the papers in the cases with certificates of our decision thereon will be sent back to the Superior Court for Washington County for further proceedings.

The following opinion was prepared by Mr. Justice Blodgett as the opinion of the Court, but was not formally rendered on account of his death. It is now adopted as the opinion of the court.

BLODGETT, J. These were two indictments returned by the grand jury at the September session, 1910, of our Superior Court for the county of Washington. Each indictment was in two counts.

The first count of the De Fonti indictment charges that the defendant on the 24th of April, 1910, at Charlestown, in Washington County, "Did feloniously, unlawfully and wilfully sell and suffer to be sold and deliver and suffer to be delivered ale, wine, rum and other strong malt and intoxicating liquor, mixed liquor, a part of which was ale, wine, rum and other strong malt and intoxicating liquor, in which wood alcohol, a deadly poison had been mixed and mingled, to one Timothy Riley for the use of and to be drunk by one Michael Riley, which the said Timothy Riley then and there delivered to the said Michael Riley. And the said Michael Riley then and there not knowing that said poison was mixed and mingled with said intoxicating liquor, did take, drink and swallow down a large quantity of said poison, so mixed and mingled with said intoxicating liquor as aforesaid, whereby the said Michael Riley of the poison aforesaid and by the operation thereof, and in consequence of said unlawful sale by the defendant of said intoxicating liquor in which said poison was then and there mixed and mingled, then and there became mortally sick and distempered in his body, of which said mortal sickness and distemper the said Michael Riley at Charlestown aforesaid from the said twenty-fourth day of April in the year aforesaid until the twenty-fifth day of

April in the year aforesaid did languish and languishing did live. On which said twenty-fifth day of April in the year aforesaid the said Michael Riley at Charlestown aforesaid of the said mortal sickness and distemper died, and so the jurors aforesaid upon their oaths aforesaid do say that the said John De Fonti, him the said Michael Riley in manner and form aforesaid feloniously, wilfully and unlawfully did kill and slay. Against the form of the statute in such case made and provided, and against the peace and dignity of the State.”

The second count is as follows:—“ . . . Did feloniously, unlawfully and negligently sell and suffer to be sold and deliver and suffer to be delivered a certain quantity of wood alcohol, a deadly poison, which was then and there mixed and mingled with other liquids and liquors, a further description of which is to the grand jurors unknown, to one Timothy Riley, instead of whiskey, which the said Timothy Riley then and there requested the said John De Fonti to deliver and cause to be delivered to him for the use of and to be drunk by one Michael Riley, which the said Timothy Riley then and there delivered to the said Michael Riley. And the said Michael Riley then and there, not knowing of the said negligence of the said John De Fonti, and believing that said mixed liquid containing said poison so delivered to him by the said Timothy Riley as aforesaid was then and there whiskey, did then and there drink and swallow down into his body a large quantity of said mixed liquid containing said poison, by means whereof and of said negligence of said John De Fonti, the said Michael Riley then and there of the poison aforesaid and by the operation thereof, on said twenty-fourth day of April in the year aforesaid, became mortally sick and distempered in his body, of which said mortal sickness and distemper the said Michael Riley from the said twenty-fourth day of April in the year aforesaid to the twenty-fifth day of April in the same year, at Charlestown aforesaid, did languish and languishing did live. On which said twenty-fifth day of April in the year aforesaid at

Charlestown aforesaid, he, the said Michael Riley did die. And so the jurors aforesaid, upon their oaths aforesaid, do say that him, the said Michael Riley, the said John De Fonti in manner and means aforesaid then and there feloniously, unlawfully and negligently did kill and slay. Against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The counts in the Cisco indictment were identical, except that in each count the sale and delivery was alleged to have been made directly to deceased, rather than to an agent for deceased's use.

Upon defendants' demurrer to the indictments questions of law were certified to this court as follows, under Section 5 of Chapter 298 of the General Laws:—

De Fonti Case.

"1. In an indictment charging the defendant with manslaughter because of his unlawful sale of an intoxicating liquor, in which wood alcohol, a poison, had been mixed and mingled, to an agent of deceased, for deceased's use, and which was drunk by deceased in ignorance of the presence of such poison, is it necessary to allege that defendant knew that such intoxicating liquor was poisoned?

"2. Is it necessary to allege facts from which such knowledge could be inferred?

"3. In an indictment charging the defendant with manslaughter, because of his alleged negligence in selling and delivering a quantity of wood alcohol, a deadly poison, mixed with some other liquor, to an agent of deceased, to be drunk by deceased, instead of whiskey, which such agent requested defendant to sell and deliver to him, and which deceased drank, believing it to be whiskey, is it necessary to set out the facts constituting such alleged negligence?

"4. Is it necessary to allege facts from which it could be inferred that defendant knew or should have known that such liquid contained wood alcohol?"

Cisco Case.

Questions two and four certified in this case are identical with two and four in the De Fonti case. Questions one and three are as follows:—

“1. In an indictment charging the defendants with manslaughter because of their unlawful sale of an intoxicating liquor, in which wood alcohol, a poison, had been mixed and mingled, to deceased, which was drunk by deceased in ignorance of the presence of such poison, is it necessary to allege that defendants knew that such intoxicating liquor was poisoned?”

“3. In an indictment charging the defendants with manslaughter because of their alleged negligence in selling and delivering a quantity of wood alcohol, a deadly poison, mixed with some other liquor, to deceased, to be drunk by deceased, instead of whiskey which deceased requested defendants to sell and deliver to him, and which deceased drank, believing it to be whiskey, is it necessary to set out the facts constituting the alleged negligence?”

- (1) We are of the opinion that the first count in each of these indictments is defective in that it does not charge the accused with knowledge of the poisoning of the liquor, although his sale of the whiskey was contrary to law. More than two hundred and fifty years ago and at the time of the first beginning of this colony it was said by Sir Matthew Hale, Lord Chief Justice of England, in his pleas of the Crown (pp. 429, 430, 475): “If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgeon, 3 E. 3 Coron. 163. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore if they be not licensed according to the statute of 3 H. 8 cap. 11, or 14 H.

8 cap. 5, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

"These opinions therefore may serve to caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by."

"This doctrine therefore, that if any die under the hand of an unlicensed physician, it is felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, though it may, as I said, have its use to make people cautious and wary, how they take upon them too much in this dangerous employment."

"By the statute of 33 H. 8 cap. 6. 'No person not having lands, &c. of the yearly value of one hundred pounds *per annum* may keep or shoot in a gun upon the pain of forfeiture of ten pounds.' Suppose therefore such a person not qualified shoots with a gun at a bird, or at crows, and by mischance it kills a by-stander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him, for though the statute prohibits him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not inance the effect beyond its nature."

And the same doctrine has been applied to the present time. Thus in *Moynihan v. The State*, 70 Ind. 126, 130, the court observes: "By the innocent administration of poison no penal law is violated, no moral turpitude is shown. To hang a man for such a mistake, or incarcerate him for life, is a barbarity not inflicted by the law of any civilized and enlightened people."

The first and second questions certified to us in each case are therefore answered in the affirmative.

We are of the opinion that the second count in each indictment is sufficient. The accused is here charged with negligently substituting wood alcohol, a deadly poison, for

whiskey which was ordered and paid for. Either the accused knew that he was delivering wood alcohol, a deadly poison, in place of whiskey, or he negligently represented the liquid so delivered to be whiskey without having any knowledge whether it was or was not the whiskey which had been called for. So acting in either event he must be held liable for the consequences of his act if it be proved at the trial. The third and fourth questions in each case are accordingly answered in the negative.

William B. Greenough, Attorney General, Harry P. Cross, Assistant Attorney General, for State.

John W. Sweeney, for defendant.

WALTER L. KELLEY vs. EMMA S. BLANCHARD *et als.*

APRIL 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Champertry. Contracts.*

Where an agreement is champertous, the illegality extends to all acts done in pursuance thereof.

Where an agreement is champertous, a deed between the parties in pursuance of the agreement, whereon a bill in equity to set aside a foreclosure is based, is tainted with the same illegality and affords no basis for relief.

Champertry is an offence against the law and avoids every contract into which it enters.

After a foreclosure, the mortgagor deeded his interest to complainant, under an agreement by which complainant was to bring proceedings at his expense to set aside the foreclosure sale, and if successful in this, to sell the property and divide the profits.

Held, that the agreement was champertous.

BILL IN EQUITY to set aside foreclosure sale. Heard on appeal of complainants and dismissed.

DUBOIS, C. J. This is a bill in equity brought in the Superior Court by Walter L. Kelley against Emma S. Blanchard, Roger F. Capwell, her attorney in fact, Ella F.

Luther and Samuel Kessler, to set aside a foreclosure sale, under mortgage from one Frank A. Whittaker to said Emma S. Blanchard, of two contiguous lots of land in the city of Pawtucket, one on High street and the other on Hamilton street and designated as lots numbered 90 and 104 on Pawtucket Assessors' plat card No. 43 and to redeem these lots from said mortgage and for an accounting of the rents and profits of the mortgaged premises. Said lots are in the possession of tenants of the respondent Kessler, who claims title thereto as grantee in a deed, from one Frederick E. Matteson, dated January 6, 1909, who was grantee in a deed of even date from the respondent Blanchard, who was the mortgagee and purchaser of them at the foreclosure sale in question, which was held December 29, 1905, at twelve o'clock noon. The complainant alleges that the foreclosure sale is invalid in this: that whereas in said mortgage twenty days' notice of said sale was required to be published in some newspaper printed in said Pawtucket, twenty days' notice thereof was not given because the publication of the notice was made on the 8th, 15th, 18th, 22nd and 29th days of December, 1905, in the Evening Times, a daily newspaper printed in said Pawtucket, and sale thereof was made on December 29th, 1905, at 12 o'clock noon. The interest of the complainant Kelley in the premises is derived as follows: after the disputed foreclosure had been accomplished and said Whittaker had vacated the tenement, some time in April, 1906, under notice to quit, given two months after the foreclosure, he lost all interest in the matter until the complainant called his attention to the insufficiency of the notice of foreclosure and entered into an agreement with him concerning which the complainant testified as follows: "Q. 8. Will you state to the court the terms and conditions or circumstances surrounding your purchase under that deed? Ans. The first information that I got in reference to this foreclosure or the title was through Frederick E. Matteson, who informed me that he thought the title was poor, and to see Mr. Reed about it,

and I went to Mr. Reed and he showed me a copy of his abstract which he had forwarded to Mr. Capwell, and I went then to Mr. Whittaker and told him the circumstances which I had found out and 'Well,' he says, 'We haven't got any money to do anything with;' and they left it that way. 'Well,' I says, 'Why, I will put this money in and, if necessary, I will buy your interest and we will repurchase this property if possible, pay off the debts, and whatever there is obtained by the sale of it we will divide the profits,' which was agreed upon and he made that deed which was recorded. Q. 9. Who was to put up the money to redeem the property? Ans. I was. Q. 10. Was there a separate agreement made between you and Mr. Whittaker? Ans. Yes. Q. 11. And the nature of that was to divide the proceeds of the sale? Ans. Proceeds of the sale. Q. 12. Have you collected any of the rents or income of that property? Ans. One rent. Q. 13. How much was that? Ans. \$7. Q. 14. Have you expended any money on it? Ans. I have not." Frank A. Whittaker also testified in relation to the matter as follows: "Q. 37. What was your deal with Mr. Kelley? Ans. Well; he came to me and he said that there was a flaw in that, and I said to him: 'Well, I will sell out to you all claims, whatever.' Q. 38. Did you tell him at that time that you didn't have any money to fight him with? Ans. Yes sir. Q. 39. At that time you didn't have any intention of making trouble? Ans. No sir; I didn't know anything about it. I was as innocent as could be. Q. 40. You wouldn't have made any claim to the property at all if Mr. Kelley hadn't come around? Ans. No sir. Q. 41. You did sell out to Mr. Kelley? Ans. Yes sir. Q. 42. How much did you get? Ans. One dollar. Q. 43. That is all the money you ever got? Ans. Yes sir."

On the first day of June, 1911, the following decree was entered in the Superior Court: "Upon motion of the complainant, Frank A. Whittaker is added as party complainant, on condition that complainants recover no costs to date."

- Thereafter on the seventh day of said June the following agreement, signed by the solicitors for the respective parties was filed in the Superior Court: "It is agreed by the parties to the above entitled cause that it shall be decided in the same way as if the respondents had alleged in their answers a champertous agreement between the complainants with reference to the subject matter of this cause and claimed the benefit thereof as a defence." The respondents had severally made answer to the bill and issues of fact were framed and the cause was heard in the Superior Court on the seventh day of June, 1911, at which time testimony was taken and a decree was entered dismissing said bill upon the ground that the agreement between Whittaker and Kelley was champertous. The complainants appealed from said decree upon the grounds that the respondents were not entitled to the relief prayed for; that the decree is against the evidence and the weight thereof; that the decree is against the law and that the decree is against both law and evidence. The appeal was duly prosecuted to this court and is now before us for consideration. We deem it unnecessary to
- (1) consider anything other than the agreement entered into by Kelley and Whittaker, concerning the premises in dispute, for if the same is champertous, it is illegal and void in all its parts and the illegality extends to all acts done in pursuance thereof. Therefore if the agreement is illegal as aforesaid the deed from Whittaker to Kelley, whereon this bill is based, is tainted with the same illegality and affords no basis for these proceedings. The testimony of Kelley and Whittaker, concerning the agreement, hereinbefore set forth, is clear, concise and convincing. It leaves no manner of doubt concerning their intention in the premises. In fact it furnishes an excellent definition of champerty. "Champerty, which is a species of maintenance, has been defined to be the unlawful maintenance of a suit, in consideration of some bargain, to have a part of the thing in dispute, or some profit out of it, a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other thing sued for

between them if they prevail at law, the champertor agreeing to carry on the suit at his own expense." 6 Cyc. 850 and cases cited. In the case of *Martin v. Clarke, et als*, 8 R. I. at p. 403, 1866, Brayton, J., speaking for the court, concluded the opinion in the language following: "Whether we look, therefore, at the ancient common law, to the English statutes upon the subject, or to our own legislation, the conclusion must be the same,—that champerty is an offence against the law. Being such, it must avoid every contract into which it enters." Although nearly half a century has elapsed since the promulgation of the foregoing opinion it has never been overruled, doubted or denied, and the same remains the law of the state. Neither has the legislature seen fit to modify the law as expressed in that opinion.

For these reasons we are of the opinion that the Superior Court did not err in entering the decree dismissing the complainants' bill of complaint.

The complainants' appeal is therefore dismissed, the decree appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

James E. Brennan, for complainants.

William M. P. Bowen, for Emma S. Blanchard and Admr. estate of Roger F. Capwell.

Gardner, Pirce & Thornley, for respondents Luther and Kessler.

William W. Moss, of counsel.

TIMOTHY F. SULLIVAN vs. JOHN R. WHITE, INC.

APRIL 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Exceptions. New Trial. Procedure.*

Under Gen. Laws, 1909, cap. 298, bills of exceptions are not in order for filing in the superior court and for certification to the supreme court until after all matters arising in the cause in the superior court have been determined,

and in case a motion for new trial is made by *either* party, not until after decision upon that motion.

The practice provided by statute is that all exceptions, taken by both parties, up to the end of the period within which exception may be taken to the final decision in the superior court shall be before the court for determination at one time.

(2) *Exceptions. New Trial. Procedure.*

General Laws, 1909, cap. 298, § 17, provides that a party desiring to prosecute a bill of exceptions shall "within seven days after verdict or notice of decision, but if a motion for a new trial has been made, then within seven days after notice of decision thereon file notice of his intention to prosecute a bill of exceptions."

Within seven days after a verdict for plaintiff, defendant gave notice of intention to prosecute a bill of exceptions. Also within seven days plaintiff filed motion for new trial on the ground of inadequacy of damages.

Held, that defendant's notice was prematurely filed and should be refiled after decision of the court upon plaintiff's motion for new trial.

TRESPASS ON THE CASE. Heard on motion of plaintiff to assign defendant's bill of exceptions and denied.

SWEETLAND, J. On December 12th, 1911, at the conclusion of the trial of this case before a justice of the Superior Court sitting with a jury, a verdict was rendered for the plaintiff for \$2,000. Within seven days thereafter the defendant gave notice of its intention to prosecute a bill of exceptions to this court and within the time prescribed by said justice filed in the Superior Court a transcript of the testimony and also a bill of the exceptions taken by it in the trial of the case in said court. Also within seven days after said verdict the plaintiff filed a motion for a new trial on the ground "that the amount of damages awarded by said verdict is grossly inadequate." The said justice refused to decide the plaintiff's motion for a new trial until after the determination by this court of the defendant's bill of exceptions, and directed the clerk of the Superior Court to certify and transmit the cause to this court upon the defendant's bill of exceptions. Upon a hearing before us on the plaintiff's motion to assign the defendant's bill of exceptions for hearing, the defendant objected to such assignment on the ground that the case is not properly in this court and should

not have been certified here until after a decision by the Superior Court upon the plaintiff's motion for a new trial.

- (1) The defendant's objection is well founded. From a consideration of all the provisions of Chapter 298, Gen. Laws, 1909, for prosecuting bills of exceptions to this court, we are of the opinion that the procedure, intended by the statute, is that appellate proceedings from the Superior Court to this court shall not be taken by piecemeal; that bills of exceptions shall not be in order for filing in the Superior Court and for certification to this court until after all matters arising in the cause in the Superior Court have been determined; in case a motion for a new trial is made by either party, not until after the decision on that motion has been given by the Superior Court. This provides an orderly practice and generally will expedite causes. In the case at bar, it may well happen, that, if the decision upon the plaintiff's motion for a new trial be that the plaintiff have a new trial on the question of damages alone, the defendant will have another exception which it will desire to incorporate in its bill of exceptions and prosecute before this court. If the plaintiff's motion for a new trial should be denied he might wish to bring to this court an exception to such decision. Thus, if the defendant's present exceptions should be heard by us and the cause returned to the Superior Court, after the necessary delay incident to appellate proceedings, the case, probably would be certified here again upon another bill of exceptions. A more orderly practice, and the one provided by statute, is that all the exceptions, relied upon, taken by both parties up to the end of the period within which exception may be taken to the final decision in the Superior Court shall be before us for determination at one time. In the case at bar, if the procedure provided by statute had been pursued, the whole matter might be before the Supreme Court at this time. Under the statute the practice in motions for new trial is summary. Such motion must be filed within seven days after verdict, and is in order for hearing or assignment upon the first motion day occurring next after three days.

During the session of the Superior Court in the counties of Providence and Bristol each Saturday is a motion day. Furthermore, it appears by the record of the case that the plaintiff's motion for a new trial was in order for hearing on January 13th, 1912.

(2) Sec. 17, Chapter 298, Gen. Laws, 1909, prescribes as the initial step in the prosecution of a bill of exceptions to this court that the party, desiring to prosecute such bill, shall "within seven days after verdict or notice of decision, but if a motion for a new trial has been made then within seven days after notice of decision thereon, . . . file in the office of the clerk of the Superior Court notice of his intention to prosecute a bill of exceptions to the Supreme Court." The intent of this provision is, that if a motion for a new trial be filed in a case by either party thereto, then either party wishing to prosecute a bill of exceptions shall file said notice of intention after decision upon the motion for new trial, and within seven days thereafter. In the case at bar the defendant, perhaps, not finding it convenient or not deeming it prudent to wait until the last hour of the seven days after verdict filed its notice of intention to prosecute a bill of exceptions before it knew whether a motion for a new trial would be made by the plaintiff. Upon the seasonable filing of the plaintiff's motion for a new trial, however, the defendant's notice of intention to prosecute became of no account and such notice must be refiled after the Court's decision upon the plaintiff's motion for new trial.

We are led to hold that the defendant must thus refile its notice of intention to prosecute because upon the seasonable filing of such notice the statute prescribes the constant progress of such appellate proceedings. When they reach the final stage in the Superior Court they are forthwith sent to this court. If therefore a party be allowed, immediately after a verdict, to commence the prosecution of the exceptions taken by him up to that time, upon which he relies, without waiting for the final decision of the Superior Court, it would at times happen that a cause would be pending at the

same time in the Supreme Court upon exceptions and in the Superior Court upon a motion for a new trial. The construction that we have made is necessary if the proceedings are to harmonize with what we find to be a primary intent of the statute, that appellate proceedings in a cause are to follow the final action of the Superior Court therein. See *Malafronte v. Milone*, 33 R. I., 460.

We are of the opinion in the case at bar that the defendant's notice of intention to prosecute a bill of exceptions was prematurely filed and that all proceedings based thereon should be disregarded. The justice of the Superior Court should have heard and decided the plaintiff's motion for a new trial.

The plaintiff's motion to assign is denied; and the cause will be returned to the Superior Court as not ready for certification.

Cooney & Cahill, for plaintiff.

Gardner, Pirce & Thornley, for defendant.

William W. Moss, of counsel.

FLINT MOTOR CAR COMPANY vs. EDWARD W. EVERSON.

APRIL 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence. Book Account. Secondary Evidence.*

In an action on book account, the bookkeeper of plaintiff was properly permitted to testify from a book as to the alleged account, where it appeared that the original slips had been accidentally destroyed by fire, and that the book contained correct copies thereof, made by her, for irrespective of the validity of the book as one of original entry, it was competent secondary evidence of the contents of the slips.

(2) *Evidence.*

Q. "How much do you consider is your loss in being deprived of the use of your automobile?"

Held, properly excluded as calling for an opinion and not for facts.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

DUBOIS, C. J. This is an action of assumpsit on book account, brought by the plaintiff in the Superior Court to recover the sum of \$517.38 for work done and materials furnished in repairing the defendant's automobile. The plea was the general issue. The case was tried before a jury in the Superior Court and resulted in a verdict for the plaintiff for \$623.40. Thereupon the defendant made a motion for a new trial of the case before the judge who presided at the trial and the same was denied. Whereupon the defendant excepted to such ruling and has duly prosecuted his bill of exceptions, containing the same and other exceptions saved by him during the course of the trial, to this court and the case is now before us upon said bill of exceptions, which reads as follows: "Now comes the defendant in the above entitled cause and files this, his bill of exceptions, and says:

"This is an action in assumpsit on an alleged book account brought by the plaintiff against the defendant to recover the sum of \$517.38.

"Said cause was tried before Mr. Justice Rathbun and a jury on the 5th and 6th days of May, A. D. 1911, and a verdict was rendered in favor of the plaintiff for the amount claimed, with interest added thereto.

"That within seven days of the rendering of said verdict the defendant filed a motion for a new trial, which said motion was based on the following grounds:

"1. That said verdict is against the evidence and weight thereof.

"2. That said verdict is against the law.

"3. That the damages awarded by said verdict are excessive.

"That said motion for a new trial was subsequently heard on the 27th day of May, A. D. 1911, by Mr. Justice Rathbun and denied and the defendant's exception noted to said decision.

"That within seven days of said decision denying defendant's motion for a new trial, the defendant filed a notice in the office of the Clerk of the Superior Court of his intention to prosecute his bill of exceptions to the Supreme Court.

"That during the trial and the proceedings of said case certain errors were committed by said court and certain exceptions were actually taken by defendant, which said errors and exceptions are shown in and by the transcript of the testimony taken in said cause, filed herewith and made a part of this bill of exceptions. Said exceptions, stated clearly and separately, are, viz.:

"1st: To the ruling of the justice presiding at the trial of said action in permitting the witness Alma C. Mowry to read from a book certain entries made by her therein from original slips, the original slip not being produced in court, and to testify from said book as to the alleged book account held by the plaintiff against the defendant.

"Which said exception is found on page 4 of the transcript of the testimony and was preceded by objection of counsel found on pages 2 and 3 of the transcript of testimony to questions 14, 15 and 18, respectively.

"2nd: To the ruling of the justice presiding at the trial in permitting witness Alma C. Mowry to testify as to book entries from the book she had made of entries copied from original slips.

"Which said exception is found on page 6 of the transcript of testimony.

"3rd: To the ruling of the justice presiding at the trial, in refusing to strike out the testimony of Alma C. Mowry, bookkeeper for the plaintiff.

"Which exception appears on page 56 of the transcript of the testimony.

"4th: To the ruling of the presiding justice in excluding the answer of the defendant to question 41 of his direct examination, as to his own damages.

"Which said exception is found on page 78 of the transcript of testimony.

"5th: To the ruling of the justice presiding at the trial in permitting the plaintiff's counsel to inquire of the defendant as to any indebtedness of his to the Union Trust Co. as asked in question 131 to defendant on page 89 of the transcript of testimony.

"Which said exception is found on page 89 of the transcript of testimony.

"6th: To the ruling of the justice presiding at the trial in permitting the plaintiff's counsel to inquire of defendant as to any indebtedness of his to the Union Trust Co. as asked in question 133 to defendant on page 89 of the transcript of testimony, which said exception is found on page 90 of the transcript of testimony.

"7th: To the refusal of the court to charge the jury as requested by the defendant as follows: 'The original time slips for the time of workmen on this job not being produced, and no original slips for material used upon the job being presented, the jury are not entitled to consider as evidence of a shop book or book account the book of entries introduced by the plaintiff to prove the amount of charges against the defendant.'

"Which said exception is found on page 100 of the transcript of testimony.

"8th: To that portion of the charge of the justice presiding at the trial in which he charged the jury as follows: 'The plaintiffs have introduced their books in evidence, they have explained their system of bookkeeping. The bookkeeper testifies that she copied accurately the slips which were handed in to her, showing the amount of labor and materials furnished to the defendant to be used upon his car. The foreman of the shop has testified that the slips which he delivered were accurate and that they gave a true statement of the labor and materials furnished to the defendant's car.'

"Which said exception is found on page 100 of the transcript of testimony.

"9th: To the ruling of the justice presiding at the trial in denying the defendant's motion for a new trial, based on the grounds:

"(1) That the verdict in said cause was against the evidence and the weight thereof.

"(2) That the verdict was contrary to law.

"(3) That the damages awarded by said verdict are excessive.

"Which exception is found among the Clerk's entries on the jacket of the papers in said cause and is further found in the notice filed by the defendant of his intention to prosecute his bill of exceptions.

"And the defendant insists that all of said rulings are erroneous and prejudicial to the defendant, and that said errors entitle the defendant to have a new trial or to have judgment entered in this court for the defendant.

"Wherefore, within the time prescribed by law, the defendant tenders this his bill of exceptions, and prays that the same may be allowed by this court in accordance with law."

The defendant waiving his fifth and sixth exceptions relies upon the others and claims that thereby the following questions are raised:

"I. Is the testimony of witness Alma C. Mowry as to the alleged book account of the plaintiff proper and competent evidence to support the items in book account when witness had no personal knowledge of the work and materials furnished and the original slips from which she made the entries are not produced in evidence?

"This question is raised by the 1st, 2nd, 3rd, 7th, and 8th exceptions.

"II. Did the court err in refusing to permit the defendant to testify or submit evidence as to his damage in not having the use of his car for a period of more than two months after the time, as he claimed, that the job was to be completed by the plaintiff?

"This question is raised by the 4th exception.

"III. Did the court err in refusing defendant's motion for new trial?

"This question is raised by the 9th exception."

- (1) There is no merit in the defendant's 1st, 2nd, 3rd, 7th, and 8th exceptions. The evidence of the bookkeeper was that she made absolutely correct copies of the original slips that were handed in to her daily. It further appeared that these original slips had been accidentally destroyed by fire. In these circumstances, whatever criticism may be made concerning the validity of the book as one of original entries, it was competent secondary evidence of the contents of the slips. "Where the writing containing or constituting the primary evidence of the fact to be proved is satisfactorily shown to have been lost or destroyed without the fault of the party desiring to prove the fact, secondary evidence becomes admissible." 17 Cyc. 518 and cases cited. Moreover, this testimony was supplemented and corroborated by that of the treasurer and manager of the plaintiff company, and also by the foreman and one of the workmen in its employ.

The fourth exception relates to a ruling of the court in excluding the following question propounded to the defendant by his counsel in direct examination: "41 Q. How much do you consider, Mr. Everson, is your loss in being deprived of the use of your automobile from April till June 22nd, when you could run it?" The question was properly excluded. It called for an opinion and not for facts. The judge in the Superior Court very properly inquired: "What is it that he claims might be his loss? What are the items of his loss?" The exception is therefore overruled.

The last exception relates to the refusal of the court to grant the defendant's motion for a new trial. The verdict is not against the law, for it nowhere appears that the jury disregarded the instructions of the court. The verdict of the jury was approved by the judge who presided at the trial and saw and heard the witnesses who testified in the case and there is nothing to indicate that the verdict of the jury on the facts is against the weight of the evidence.

As it does not appear that the verdict is the result of passion, prejudice or other improper motive or that the judge erred in his approval of the verdict the case comes

within the rule announced in the case of *Wilcox v. The Rhode Island Company*, 29 R. I. 292. The defendant's exception on this ground is therefore overruled.

All of the defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment on the verdict.

J. Jerome Hahn, John Henshaw, for plaintiff.

Bassett & Raymond, for defendant.

R. W. Richmond, of counsel.

DEXTER B. POTTER, Adm. vs. EDWIN B. HARVEY.

APRIL 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Executors and Administrators. Splitting Claims. Disallowance.*

Appellee, who had a continuous running account for services rendered by him as a physician to his sister, within the period of six months from the first publication of the notice of the appointment of her administrator, filed a claim against her estate, which was disallowed and suit was brought thereon and subsequently settled. Within the period of one year from said notice, appellee filed a second claim covering items for services, which he alleged he forgot to include in the first claim, but recalling the omitted items and being advised that the claim was valid, he filed it at that time. It was not disallowed.

Held, that it was not a case of one who through accident or mistake, having severed his claim was attempting to reunite it, but of one, who, having discovered the mistake, ratified the severance by filing a separate claim, and insisted upon the validity of both claims.

Held, further, that while the statute C. P. A., § 883 (now Gen. Laws, 1909, cap. 314, § 3), gives a preference to claims filed within six months over those subsequently filed, no claimant has the right to sever claims otherwise indivisible for the purpose of making a part preferred over the other.

Held, further, that as claimant did not have two accounts against the estate he was not entitled to file two claims and there was no necessity for the disallowance of the second claim, and the administrator was not guilty of unfaithful administration for not paying the same.

(2) *Severing Cause of Action.*

A demand indivisible in its nature, cannot be split so as to authorize several actions for the same claim, and if a recovery is had of a part of such a demand it will be regarded as an election to accept that part for the whole.

(3) *Severing Cause of Action.*

In the absence of special circumstances, an open or continuous running account between the same parties, constitutes a single and entire demand which is not susceptible of division, the aggregate of all the items being regarded as the amount due and it cannot be severed for the purpose of bringing different suits on its different parts.

PROBATE APPEAL. Heard on exceptions of appellant and sustained.

DUBOIS, C. J. This is an appeal from the decree of the Municipal Court of the city of Providence, entered February 5th, 1909, adjudging the said Dexter B. Potter as administrator upon the estate of Abbie M. Harvey, deceased, to be guilty of unfaithful administration for neglecting and refusing to pay the claim of Edwin B. Harvey, M. D., "for professional services from Feb. 1, 1902, to March 17, 1906, \$400.00," filed May 15, 1907. Said appeal was duly entered and prosecuted in the Superior Court and the decree of the Municipal Court was therein affirmed, for the reasons appearing in the following rescript: "Tanner, P. J. This is an appeal from the action of the Municipal Court of Providence adjudging the appellant guilty of unfaithful administration in refusing to pay a claim allowed by operation of law against the estate of which the appellant is administrator.

"It appears that the appellee filed a claim against the estate within six months and brought suit thereon after disallowance by the administrator, and that he afterwards filed within the statutory period another claim against the estate which was not disallowed by the administrator within the statutory period given for that purpose. The appellant appeals from the decision of the Municipal Court adjudging him guilty of unfaithful administration.

"The first reason of appeal is that the administrator disallowed the claim as by record therewith filed is shown.

"The meaning of this is that the administrator attempted to disallow the claim more than 30 days after the expiration of the time within which he might have disallowed the claim,

because of the provisions of Sec. 6 of Chap. 314 of the Gen. Laws of 1909, because of evidence discovered after the period within which he might have originally disallowed the claim. We think, however, this provision of the statute refers to evidence which the administrator could not with reasonable diligence have discovered within the time originally given for disallowance. The newly discovered evidence presented in this case is clearly evidence which the administrator could have discovered within the time originally given, and in all probability would have discovered had he been aware of the filing of the claim. The administrator, in fact, did not discover the filing of the claim because he did not examine the records of the Probate Court, and did not know of the filing of the claim until after the thirty days prescribed by law. The administrator alleges as an excuse that the appellee had filed a prior claim against the estate and brought suit thereon. The appellant also urges that the appellee by his conduct in filing the first claim, and saying nothing about the second claim, excused the administrator from looking for further claims. We find nothing, however, in the evidence which warrants that conclusion. The appellee did not know that the second claim was valid until so advised by counsel. We think, therefore, that the evidence urged as newly discovered was evidence which the administrator did not discover because he did not examine the records as he should have done to discover the filing of the claim. The case of *Raub vs. Nesbitt*, 111 Mich. 38, is urged upon our attention. The newly discovered evidence in that case, however, was evidence which the administrator was prevented from finding because of the attitude of the claimant in changing his claim at the time of the trial of the appeal. In the case at bar, however, the administrator was prevented from discovering the evidence because of his own neglect to examine the records. We think a claimant has a right to file amended or additional claims within the statutory period. In fact, that is his only recourse if he discovers that he has made a mistake or an omission. The

rule against splitting causes of action does not, we think, apply to the mere filing of different claims against an estate. It is true that in the case at bar the appellant might have defeated the second claim because of the action brought upon the first, which would estop the appellee from maintaining any further action on a claim which might have been included in the first suit, but this, as we have seen, the administrator might have done by a disallowance within the thirty days, and we cannot see how this amounts to newly discovered evidence within our construction of the statute. We think the appellant attempted to disallow the claim, not upon evidence discovered after the thirty days, but rather upon discovery of the existence and filing of the claim after the thirty days.

“The remaining reasons of appeal are to the effect that the appellee was estopped from filing the second claim, that the second claim was not such a claim as should have been allowed, and that the decree of unfaithful administration was erroneous.

“These reasons, we think, have been fully dealt with in our discussion of the first reason of appeal. We should be very glad to afford relief to the estate and administrator if we felt that we could do so within the law as we construe it.

“The decree of the Probate Court is affirmed.”

The case comes before this court upon the appellant's bill of exceptions based upon the following grounds: That the decision of the Superior Court affirming said decree is against the law, and secondly, that the same is against the evidence and the weight thereof. It appears in evidence that the date of the first publication of notice of the appointment and qualification of the appellant as administrator of the estate of Abbie M. Harvey, deceased, was May 17, 1906. That on the fourteenth day of November, 1906, the appellee filed the following claim against said estate:

"PROVIDENCE, R. I., Nov. 14th, 1906.

"Estate of Abbie M. Harvey,

"To E. B. Harvey, M. D., Dr.,

139 weeks board, from May 1st, 1899 to Jan. 1st, 1902.....	\$1,390 00
Professional services, from April 15th, 1900 to Jan. 1st, 1902.....	1,610 00
	<hr/>
	\$3,000 00

"P. O. Address 18 Broad St., Providence, R. I.;"

that said claim was duly disallowed by said administrator within thirty days after the expiration of six months from said publication; that suit was brought thereon by said appellee by writ dated June 6, 1907, and served June 7, 1907, and the case was tried and a verdict rendered therein by a jury; that the case was afterwards settled by the parties on the first day of August, 1908, as appears by a receipt which reads as follows: "Received from Dexter B. Potter, Administrator of the Estate of Abbie M. Harvey, \$350 in full settlement of suit, entitled Edwin B. Harvey vs. Dexter B. Potter, Administrator of the Estate of Abbie M. Harvey, now pending in the Superior Court in this state, numbered 23416, for board and professional services furnished said Abbie M. Harvey, from May, 1899 to January 1, 1902;" that on the fifteenth day of May, 1907, the appellee also filed in the office of the clerk of the said Municipal Court the following claim against the said estate:

"Providence, R. I., May 15, 1907.

"Estate of Abbie M. Harvey,

"To E. B. Harvey, M. D., Dr.,

"183 Broad Street, cor. Stewart.

For professional services, from Feb. 1, 1902 to March 17, 1906..... \$400 00."

No notice was given by the claimant of the filing of this claim and the appellant had no actual notice of its existence until the same was called to his attention by the appellee on or about the first of September, 1908, by a letter wherein he stated that he had filed his claim which had not been disallowed and requested that a check be sent to him for the amount; this was after the settlement of the suit hereinbefore referred to. On the eleventh day of said September, the appellant sent the following letter which was duly received by the appellee:

“PROVIDENCE, September 11, 1908.

“Edwin B. Harvey, M. D.,

“181 & 183 Broad Street.

“You are hereby notified that your claim for alleged professional services to your sister, Abbie M. Harvey, deceased, filed in the clerk’s office of the Municipal Court against her estate on the 15th day of May, A. D. 1907, in the sum of \$400, has been disallowed on the 10th day of September, A. D. 1908, for the following reasons: for newly discovered evidence after one year and thirty days from the time of the administrator’s first publication of the notice of his appointment; because you had no right to divide your claim and file the same piecemeal, and that the claim as filed is too vague and uncertain to give the administrator any due notice or to constitute a valid filing of the claim.

“DEXTER B. POTTER,

“Administrator of the estate of Abbie M. Harvey.”

The law governing the case at bar concerning the presentation of claims, suits thereon and disallowance of the same, respectively, is contained in C. P. A., Secs. 883, 886 and 891, whereof the portions material to this consideration read as follows: “Sec. 883. All persons having claims, including pending suits, preferred claims, and claims of the executor or administrator, against the estate of a deceased person shall file statements of their claims in the office of the clerk of the

probate court. Claims filed within six months from the said first publication shall be preferred in payment over all claims subsequently filed. Claims not filed within one year from said publication shall be barred," etc. "Sec. 886. Within thirty days after the expiration of six months from said first publication, and at any time thereafter before payment, upon evidence discovered after said period, the executor or administrator shall file in the office of the clerk of the probate court a statement disallowing such of the claims filed as he intends to contest, and shall give notice in writing, either personally or by registered mail, to claimants whose claims are disallowed. A like statement shall be filed, within thirty days after the expiration of one year, relative to claims presented after six months, and claims filed after one year may be disallowed within thirty days after notice of filing," etc. "Sec. 891. If the estate is solvent, and commissioners are not appointed, suit must be brought on a disallowed claim within six months after notice is given to the creditor that the same is disallowed; and unless otherwise authorized, suit on such claims shall not be brought thereafter against the executor or administrator."

The appellee's explanation of how he came to file his second claim is as follows: (p. 28) "Q. 11. Tell the court why you happened to file the second claim? Ans. Well; as I understood a doctor's claim or anybody's else claim, I suppose to be a preferred claim, should be presented within the first six months after the first notice of the administrator and I didn't put in a bill until a very few days, until within may be two or three days within the expiration of that period of six months, and then I put in a bill for board and professional services up to the time my sister left me. Q. 12. Up to the time she left you? Ans. Yes; up to the time she left my residence, and I hastily made out that bill and I forgot to include in it any item or bill for professional services from the time she left my home until the time she died, during which time I was her sole and only medical attendant,

and as has been stated here she was feeble and needed a great deal of attention. It has been stated that I made two or three visits which is of course absurd. I was her only medical attendant. I had others in consultation at times. Dr. Shattuck on Broadway made other visits purely at my request. Doctor Miller saw my sister with me at my request. Dr. Kingman, who was an expert on nervous diseases, saw her twice I think, at my request and it is perfectly absurd to say that I never went there but two or three times. It is utterly false. Q. 13. How did you discover that you had a right to put in this second bill? Ans. You put me wise to that. You told me that I had not included the bill for professional services, from the time she lived with Mrs. Aldrich up to the time she died, and I thought I had lost my right because it was outlawed. I thought it had to come within the first six months and you told me it was within a year and you did not tell me that until very near the expiration of the year. I didn't bother my head about it. I thought that in not putting it in during the first six months it was outlawed. The first six months and the second six months, I believe there is a difference isn't there? Q. 14. Did you gather from information by counsel that the validity—did you gather that there was any difference as to the validity of your two claims, one being of stronger validity or of weaker validity than the other? Ans. That was the idea precisely, that the second bill was a valid claim. The first bill while she was under my roof at the time did not seem to me to be so valid. She was a member of my household. Q. 15. Did you at any time endeavor to deceive Mr. Potter and conceal from him this claim? Ans. No, I never did. I supposed the records of city hall could be referred to at any time. I didn't discuss that matter with him. I supposed it was up to him to be certain of the records in the city hall. Q. 16. Did you ever give him to understand that your first bill covered all your services? Ans. I never did." From the foregoing it appears that the appellee had an account for board and pro-

fessional services as a physician against the estate of his deceased sister, and that he filed his claim for the same properly before the expiration of six months after the first publication of notice by the administrator. We have held that: "the statute was literally complied with and its purpose accomplished when notice to the representative of the deceased debtor was given according to law in a manner that is held to be equivalent to the service of process upon a defendant so as to subject the executor or administrator to the jurisdiction of the court or other tribunal, and give validity to the judgment or allowance that may follow. 2 Woerner, Adm. § 397 and cases cited." *Taylor v. The Superior Court*, 30 R. I. 560, 566, and see, also, *Municipal Court v. Bostwick*, 31 R. I. 551, 555.

- (2) "It is a well settled principle of law that a judgment concludes the rights of the parties with respect to cause of action stated in the pleading on which it is rendered, whether such action embraces the whole or only part of the demand constituting the cause thereof, and from this it follows that a demand indivisible in its nature cannot be split so as to authorize several actions for the same claim; and if a recovery is had of a part of such a demand, it will be regarded as an election to accept that part for the whole." 23 Cyc. 436 and cases cited. "The object of the rule is to prevent repeated litigation between the same parties in regard to the same subject of controversy; to protect defendant from unnecessary vexation; and to avoid the costs and expenses incident to numerous suits." *Ibid*, p. 438 and cases cited. In the language of Mr. Justice Miller, in *United States v. Throckmorton*, 98 U. S. p. 65: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest reipublicae, ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*." There is a difference of opinion concerning the divisibility of running accounts for

- (3) the purpose of bringing more than one suit thereon. "While there are many decisions to the effect that each separate item of a running account furnishes a distinct cause of action which at the option of the creditor may be separately sued upon, unless there is an express contract to the contrary, the circumstances show that one entire contract was intended, or from usage or the course of dealing an agreement or understanding to that effect may be inferred, yet, by what appears to be the better doctrine it is held that in the absence of special circumstances an open or continuous running account between the same parties constitutes a single and entire demand which is not susceptible of division, the aggregate of all the items being regarded as the amount due." 23 Cyc. 440 and cases cited. The better doctrine above alluded to has been recognized by this court in the case of *Corey v. Miller*, 12 R. I. 337, wherein it appeared that the action was assumpsit to recover a balance due by book account. A part of the account accrued before, and a part after, July 1, 1870. The action was begun by a writ of arrest in the usual form, dated November 13, 1876, and served the following day by arrest of the defendant. Gen. Stat. R. I. cap. 195, § 8, authorizes the issuing of a writ commanding the arrest of any person not exempt by law from arrest in any action for the recovery of a debt, the cause of which accrued previously to the first day of July, 1870. The defendant moved to dismiss the suit upon two grounds whereof the second alone is pertinent to the present inquiry. The opinion was written by Matteson, J., and the following is his language relative thereto: "The second ground of the motion is, that the declaration discloses no cause of action which authorized the arrest of the defendant, because the balance of account in favor of the plaintiff constitutes one entire demand, and as the last items in the account did not accrue till the 12th day of September, 1870, the balance of account sued for is to be considered as a cause of action accruing on that day. An account is so far treated as one entire demand, unless there is something in the course or nature of the dealings of the

parties, or in the mode of keeping it, to indicate a contrary intention, that it cannot be severed for the purpose of bringing different suits on its different parts. If it could be so severed, as many different suits might be brought as it contains distinct items. This multiplication of suits, with its attendant expense and hardship to the debtor, it is the purpose of the rule to prevent. But an account is not so far treated as one entire demand that a creditor is compelled to sue for the whole of it against his wishes. He may sue for a part. If he does so, he cannot afterwards sue for the rest. *Guernsey v. Carver*, 8 Wend. 492; *Bendernagle v. Cocks*, 19 Wend. 207; *Borngeesser v. Harrison*, 12 Wis. 544.

"If the plaintiff had omitted from his suit so much of his account as accrued subsequently to July 1, 1870, the defendant's arrest would have been legal; but inasmuch as he has included in it the entire account, for a part of which the law gave no authority to arrest the defendant, the arrest must be considered illegal and void. *Bowen v. True*, 53 N. Y. 640; *McGovern v. Payn*, 32 Barb. S. C. 83, 91. The motion is therefore granted, and suit is dismissed."

The appellee does not contend that he had more than one account for medical attendance against the said estate, which was a continuous running account for services rendered by him as a physician, to his sister from April 15, 1900 to March 17, 1906, whereof notice had been given to the representative of the deceased debtor according to law, but he testified that in the claim he filed he "forgot to include in it any item or bill for professional services from the time she left my house until the time she died." That is he forgot to put in all of his running account and only put in a part. But before the expiration of a year from the first notice of publication he not only recalled to mind the omitted items for professional services, but also was advised that the claim was valid and enforceable against the said estate.

This is not the case of a claimant who, through accident, misfortune or mistake, has unwittingly severed his entire account by filing a claim for a portion, instead of the whole of

the same, and who has attempted to reunite it for the purpose of establishing a single claim for the whole account against an estate within the period fixed by law for the filing of such claims. In such a case every facility should be afforded for the accomplishment of such a laudable object. The law looks with favor upon the early recognition of mistakes and endeavors made to correct them within the prescribed periods of limitation. But the present case cannot be included within that category. In the case under consideration the claimant, who had inadvertently severed his account by filing a claim for a portion thereof when he intended to file a claim for the whole, but who forgot to include therein certain items, discovered his mistake before the expiration of the statutory period for the filing of claims, but instead of endeavoring to unite the severed portions of his account he ratified the severance by filing a separate and independent claim for the portion of the account omitted from the first claim filed, and now insists upon the validity of both claims. He has never attempted in any manner to effect a union of the severed portions of his account, but claims that he had the right to file the two claims for his account because he filed the first within the six months period under the statute and the second after such period, but within the statutory period of one year. The statute, C. P. A., Sec. 883, hereinbefore quoted, gives a preference to claims filed within six months over claims subsequently filed and bars all claims not filed within one year from the time therein prescribed. No claimant has the right to sever claims otherwise indivisible for the purpose of making one part thereof a claim to be preferred over the other part. The peculiarity of the claimant's position in regard to the severed account may be appreciated by considering his testimony concerning the validity of his claims: "Q. 14. Did you gather from information by counsel that the validity—did you gather that there was any difference as to the validity of your two claims, one being of stronger validity or of weaker validity than the other? Ans. That was the idea

precisely, that the second bill was a valid claim. The first bill while she was under my roof at the time did not seem to me to be so valid. She was a member of my household." It thus appears that the second bill which "was a valid claim" for medical services, rendered to his sister in her last sickness and until her death, was the one he forgot to file in the first instance and which he did not file in time to make it a preferred claim, and that the bill for the previous services, which did not seem to him to be so valid, was the one that he did file in time to give it preference under the law. As the appellee did not have two accounts against the estate he was not entitled to file two claims against it; he had no right to subject the estate to the expense of defending two law suits for one account. As he was not entitled to file the second as a separate and distinct claim, there was no necessity for the appellant to disallow the second claim so filed. His failure to disallow the same does not constitute an allowance of the claim, and the administrator is not guilty of unfaithful administration of the estate for not paying the same.

The appellant's exceptions are therefore sustained and the case is remitted to the Superior Court, with directions to reverse the decree of the Municipal Court of the city of Providence, whereby Dexter B. Potter, as administrator upon the estate of Abbie M. Harvey, deceased, was adjudged guilty of unfaithful administration upon said estate, entered on the fifth day of February, 1909, and for further proceedings.

Edward D. Bassett, Edward A. Stockwell, for appellant.

Arthur P. Sumner, for appellee.

WILLIAM B. GREENOUGH, Atty. Gen., *ex rel.* vs. BOARD OF
CANVASSERS OF CENTRAL FALLS *et als.*

MARCH 15, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst and Sweetland, JJ.

(1) *Taxation. Assessment. Notice. Defects.*

A resolution of a city council, passed May 1, ordered the tax assessors to assess a tax on or before August 31. The assessors fixed June 6, at 5 o'clock P. M., as the time for the assessment of such tax and gave notice to bring in accounts of ratable estates owned on the 6th day of June, at 5 o'clock P. M., and that for the purpose of receiving such accounts the board would be in session daily from the 6th to the 10th days of June, from 9.30 A. M., to 12 o'clock noon.

Held, that the assessors might select any day not later than August 31, for the assessment of the tax, provided it did not prevent the giving of the statutory three weeks notice under Gen. Laws, cap. 58, § 6.

(2) *Taxation. Notice. Defects.*

Held, further, that the notice was faulty in that no person could know in the forenoon or at noon on June 6, what property he would own at 5 P. M., and so any statements received on that day between 9.30 and 12 noon were valueless.

Held, further, that as it did not appear that any statements were then received or that any person was misled and there was ample time provided on the other days, for the reception of accounts, in a proceeding brought by the attorney-general for the purpose of vacating the assessment, so as to prevent the placing of certain names assessed for personal property upon the voting-lists, this defect would not avail the petitioner.

(3) *Taxation. Discrimination. Mandamus.*

Discrimination by a board of tax assessors in favor of certain tax payers, is no ground for relief in a proceeding brought by the attorney-general for the purpose of vacating the assessment so as to prevent the placing of certain names assessed for personal property upon the voting lists, the persons affected not being parties to the proceeding.

(4) *Taxation. Mandamus.*

The proper remedy against assessors who neglect or refuse to assess taxable persons or property is by mandamus to compel them to do so, but the petition for such writ must be brought against the assessors before the assessment roll has passed from their possession.

(5) *Taxation. Assessment.*

The action of a board of tax assessors in assessing 120 persons for personal property in the sum of \$200 each, by a vote of two assessors to one, is not the action of a majority, but that of the full board, the vote of the majority being decisive.

(6) *Taxation. Assessment. Review.*

Gen. Laws, cap. 58, § 3, provides that "all property liable to taxation shall be assessed at its full and fair cash value." Cap. 58, § 4, provides that "the assessors shall assess and apportion any tax on the inhabitants of the town and the ratable property therein, at the time ordered by the town." *Held*, that it was the duty of the assessors to assess every person and all property liable to taxation and they were not excused from this duty in case no account was rendered, and therefore, the assessment roll still being in their possession, but after the time limited for filing accounts had expired, where the assessors accepted a list of names and assessed the persons each for the sum of \$200, their action is not subject to review in a proceeding brought by the attorney-general for the purpose of vacating the assessment, so as to prevent the placing of certain names assessed for personal property upon the voting-lists.

CERTIORARI. Petition dismissed.

DUBOIS, C. J. This is a petition for a writ of certiorari and reads as follows: "William B. Greenough, Attorney-General of the State of Rhode Island, in behalf of the taxpayers and inhabitants of the city of Central Falls, in the County of Providence, in the State of Rhode Island, on the relation of Thomas Riley, Jr., of said Central Falls, respectfully shows unto this Court:

"1—That Lewis M. Smith, Adolph Messier, Silas P. Cumming, Peter Clare, and Henry Senior are the members of and compose the Board of Aldermen which is the Board of Canvassers of said Central Falls; that David Bloomfield, James J. Kelly and Joseph J. Chamberlain are the members of and compose the Board of Tax Assessors of said Central Falls, and that Charles A. Reynolds is the City Treasurer and Collector of Taxes of said Central Falls, and that Charles D. Wood is assistant City Treasurer and assistant Collector of Taxes of said Central Falls.

"2—That Section 2 of ARTICLE II of the Constitution of the State of Rhode Island, as amended, provides as follows:

"'Every male citizen of the United States of the age of twenty-one years———shall have the right to vote in the election of all civil officers and on all questions in all legally organized town or ward meetings: *Provided*,

that no person shall at any time be allowed to vote in the election of the city council of any city, or upon any proposition to impose a tax or for the expenditure of money in any town or city, unless he shall within the year next preceding have paid a tax assessed upon his property therein, valued at least at one hundred and thirty-four dollars.'

"3—That Chapters 56, 57, and 58 of the General Laws relate to taxation and the levy and collection of taxes; Section 10 of Chapter 57 contains a description of the property known as Personal Property, to wit:

" 'Section 10. Personal property, for the purposes of taxation, shall be deemed to include all goods, chattels, debts due from solvent persons, money and effects, wherever they may be, all ships or vessels, at home or abroad, all stocks and securities, shares in any bank or banking-association, in any turnpike, bridge, or other corporation, within or without this state, except such as are exempt from taxation by the laws of the United States or of this state.'

"4—Section 6 of Chapter 58 requires the Assessors of Taxes to issue a notice for all persons to bring in an 'account' of their ratable estate, to wit:

" 'Such notice shall require every person and body-corporate liable to taxation to bring in to the assessors a true and exact account of all his ratable estate, describing and specifying the value of every parcel of his real and personal estate, at such time as they may prescribe.' And, in every instance, in mentioning personal property in said chapters of the General Laws, such property is designated in detail by the names of machinery in manufactories, fixtures, tools, machinery, stock in livery stables, live-stock, farming tools, goods, wares, merchandise, and other stock in trade, etc.

"5—Section 8 of Chapter 58 requires the assessors to make a list of all the ratable estate, containing the true, full and fair cash value of the same, placing the real and personal estate in separate columns, and, also, distinguishing

those who give in an account from those who do not. And Section 20 of said chapter requires the assessors to date, sign and deposit said lists in the office of the town clerk. And Section 21 of said chapter requires the town clerk to forthwith make a copy of the same and deliver it to the town treasurer, and Section 22 of said chapter provides that whenever any town shall elect its town treasurer, collector of taxes for such town, the warrant for the collection of taxes shall be issued to the town treasurer by the town clerk. And Section 19 of Chap. 60 of the General Laws, provides for the distraint of personal property, while Sections 21 et seq., of said Chapter 60, provide for the levy upon, advertisement and sale of such distrained personal property.

“6—And your relator further shows, that the City Council of said Central Falls, by a resolution, approved May 2, A. D. 1911, ordered the assessment and collection of a tax upon the real and personal estate taxable by the city, at the rate of one dollar and fifty cents on each one hundred dollars of the value thereof; and that by said resolution the Board of Assessors of Taxes were ordered to assess and apportion the tax provided for in said resolution, on the inhabitants and ratable property in said city on or before the 31st day of August, A. D. 1911, conformably to law, a copy of said resolution being herewith filed, marked, Relator's 'Exhibit No. 1.'

“7—And your relator further shows that said board of assessors of taxes published a notice reciting that the city council of Central Falls, by resolution approved the 2nd day of May, A. D. 1911, ordered the assessment and apportionment of a tax on the real and personal 'estates' of said city which was to be assessed and apportioned *on or before* the 31st day of August, A. D. 1911, and, by the same notice, taxpayers were required to bring in an account of their ratable estates owned by them on the 6th day of June, A. D. 1911, at 5 o'clock P. M., but, your relator shows, that said notice proceeds further to say, 'For the purpose of receiving such accounts,' 'the Board of Assessors' will

be in session at the City Hall in said 'City' daily from the 6th to the 10th days of June, A. D. 1911, inclusive, 'from 9.30 A. M. to 12 o'clock; Noon.' And said notice further states that, 'The said tax as ordered by the city council of the City of Central Falls, will be assessed Tuesday, June 6th, A. D. 1911, at 5 o'clock P. M., and all real estate will be taxed to the persons or bodies corporate in whose name it stands of record at that time.' A copy of said notice being herewith filed, marked, Relator's 'Exhibit No. 2.'

"Your relator therefore shows, that no tax was assessed and apportioned on the inhabitants of said city and on the ratable estates therein, at the time ordered by the City Council of Central Falls, and relator avers that said board of assessors of taxes were wholly without jurisdiction to assess and apportion any tax on the inhabitants of said city and on the ratable estates therein, on the 6th day of June, A. D. 1911, and that in assessing and apportioning said tax or any tax at that time said assessors were wholly without authority, and that the same was assessed and apportioned without warrant of law, and that the same is wholly illegal and void.

"And your relator shows that said assessment was made before the time limited in which to bring in said accounts, and that said assessment is wholly illegal and void.

"8—And your relator shows that the tax for the year 1911 in said Central Falls was assessed on the, to wit, the 6th day of June, A. D. 1911, at 5 o'clock P. M., and that the time limited in which all persons and bodies corporate could bring in an account of their ratable estates to said board of assessors was the, to wit, from the 6th to the 10th day of June, A. D. 1911, inclusive; and your relator avers that after said 10th day of June, A. D. 1911, to wit, on or about the 15th day of June, A. D. 1911, certain persons appeared before said board of assessors and requested that they be assessed for personal property in the year 1911; and your relator avers and shows that said persons

were then and there told by said board of assessors that they were too late in bringing in their accounts to said board, and that they could not be assessed for personal property in said year; yet, your relator avers and shows that a long time after the time limited in which accounts could be brought into said board of assessors, and a long time after said persons were told by said board of assessors that they were too late in bringing in their said accounts, a majority of said board against the objection and over the protest of the minority of said board, on the, to wit, the 14th day of July, A. D. 1911, accepted from a person not a member of said board, a list of names, to wit, the names of one hundred and twenty (120) persons which names the majority of said board of assessors of taxes placed upon the tax roll of said Central Falls, as each being assessed in the year 1911, in the exact sum of two hundred dollars, each, with no description or specification of the personal property for which each of said persons is taxed, nor the nature or kind thereof nor where the same is located; and your relator avers that the personal property for which each of these persons is pretended to be assessed cannot be identified so that a levy, advertisement and sale of the same may be made if the tax assessed against the same is not paid. A copy of said list of names being herewith filed, marked, Relator's 'Exhibit No. 3.'

"9—And your relator further shows that in the year 1911, said board of tax assessors pretended to assess for personal property in said Central Falls, a large number of other persons, to wit, about three hundred and twenty-eight (328) persons, each of whom is assessed for the exact sum of two hundred dollars, without in any manner describing or specifying the personal property for which each of said persons is pretended to be assessed, nor stating the kind or nature thereof or where the same is located. And your relator avers and shows that the placing of such a large number of names on said tax roll as personal property taxpayers was not a bona fide assessment, but was done

simply for the purpose of enabling said persons to vote in caucuses for the nomination of candidates for the city council in Central Falls and for the purpose of enabling said persons to vote in the election of said city council upon the same footing as bona fide taxpayers. And said assessment is illegal and void. A list of the persons thus taxed is herewith filed, marked, Relator's 'Exhibit No. 4.'

"10—And your relator further shows that in the year 1911, said board of assessors of taxes pretended to assess for personal property in said Central Falls another large number of persons, to wit, about one hundred and thirty-eight (138) persons, each of whom is assessed for different amounts in excess of the sum of two hundred dollars, without describing or specifying the personal property for which each of these persons is pretended to be assessed, or that it is of any of the kinds of property mentioned in the General Laws, which provides for the taxing of certain personalty. And said assessment is illegal and void. A list of said persons being herewith filed, marked Relator's 'Exhibit No. 5.'

"11—And your relator further shows that said board of assessors of taxes have completed said alleged assessment, and have deposited the same in the office of the City Clerk in said Central Falls, and said city clerk has sent to the Board of Aldermen of said Central Falls, sitting as a Board of Canvassers in said city, lists of the names of said persons so illegally assessed for personal property in said city, and said Board of Canvassers, on Tuesday, September 5, A. D. 1911, instant, notwithstanding a protest in writing filed with them before said action, placed said names on said voting lists of said Central Falls, in accordance with the provisions of Section 16 of Chapter 7, and of Section 1 of Chapter 8, respectively, of the General Laws, as amended by Sections 1 et seq., of Chapter 640, Public Laws of August, A. D. 1910. And the action of said Board of Canvassers is illegal and void. A copy of said protest is herewith filed, marked, Relator's 'Exhibit No. 6.'

"All of which acts of said assessors of taxes and of said Board of Canvassers and the proceedings of said boards are recorded and fully appear in the records to be adduced and exhibited herein.

"And your relator represents and shows that said assessors of taxes had no jurisdiction in assessing said taxes in said Central Falls; and that they had no jurisdiction to assess said personal property taxes, and exceeded their jurisdiction therein, and their acts in making said assessment of the same and in relation to said assessment and the records thereof are erroneous and illegal in the several particulars and for the several causes which are recited and annexed to this petition and made a part hereof upon which your relator will rely for its support. And said board of canvassers had no jurisdiction of the names of said persons named as personal property taxpayers, and no jurisdiction to place the names of said persons upon said voting lists as personal property voters or as persons who may become personal property voters, and the records thereof are erroneous and illegal in the several particulars and for the several causes which are recited and annexed to this petition, also, and made a part hereof, and upon which your relator will rely for its support.

"Wherefore your relator prays this court will issue its writ of Certiorari ordering said Assessors of Taxes and the said Board of Canvassers to certify their records relating to the assessing of said taxes and to the assessing of said taxes for personal property and relating to the placing of the names of said persons named in relator's exhibits Nos. 3, 4, & 5, on the voting lists of said Central Falls as personal property voters, also, to the Collector of Taxes and to the Deputy Collector of taxes of said city to certify the tax roll of said city, that said records and said tax roll may be presented to this court, to the end that the same, or so much thereof as may be illegal may be quashed.

"May it please this Court to issue a citation to said Assessors of Taxes and to said Board of Canvassers, and to

the Collector of Taxes and to the Deputy Collector of Taxes, ordering and commanding them to be and appear before this court and show cause if any they have why said writ shall not issue as prayed for.

“WILLIAM B. GREENOUGH,

“Attorney-General.”

“CAUSES OF ERROR.

“1—Because it does not appear on said assessment roll or records that the persons who have been assessed for personal property in said Central Falls in the year 1911, by the Assessors of Taxes in said city, are possessed of any personal property.

“2—Because said records of said Assessors of Taxes do not show the nature, kind, description or location of the Personal Property assumed to be assessed by said assessors to said persons.

“3—Because it does not appear of record aforesaid in what the personal property assessed against said persons consists, or that it is of any of the kinds of personal property enumerated in Section 10 of Chapter 57 of the General Laws. And the Collector of Taxes has no method of knowing upon what property to distrain or upon what property to levy and sell as assessed personal property for the satisfaction of the tax so assessed against said personal property in the event of said tax not being paid.

“4—Because it does not appear on said assessment roll that the property for which the persons aforesaid are pretended to be assessed is of any of the kinds of personal property made taxable by law, or that said personal property is not exempt from taxation.

“5—Because said assessment roll fails to show that the assessment was limited to the kinds of property mentioned in the General Laws, which provides for the taxing of certain personalty.

“6—Because in the assessment of the real estate belong-

ing to the citizens and bodies corporate of said city, said assessors have described and located the same, but, have not described, designated or located the personal property for which the persons aforesaid are assumed to be assessed, and, in said assessment, have discriminated in this, that the Collector of Taxes will be able to levy on and sell said real estate for the non-payment of the tax assessed against the same, but, will not be able to distrain, levy on and sell said personal property for the non-payment of the tax assessed against the same, and this is in effect compelling the real estate taxpayer to pay money without due process of law.

"7—Because in assessing said personal property taxes said assessors have discriminated in this; that in assessing personal property taxes against the persons whose names appear on your relator's several exhibits, said assessors have failed to designate on said assessment roll that the tax assessed against said persons was limited to the kinds of property mentioned in the General Laws, which provides for the taxing of certain personalty while on said assessment roll, said assessors have assessed a tax on personal property against other persons in said city, and have on said assessment rolls designated the personal property for which each of said other persons is taxed.

"8—Because said tax was not assessed and apportioned on the inhabitants of said city and on the ratable property therein at the time ordered by the city council of the city of Central Falls.

"9—Because no tax was assessed and apportioned on the inhabitants of said city and on the ratable property therein, at the time ordered by the city council of Central Falls.

"10—Because said assessors of taxes had no authority to assess and apportion a tax on the inhabitants of said city and on the ratable property therein, on the 6th day of June, A. D. 1911, at 5 o'clock P. M.

"11—Because the notice published by said assessors before assessing and apportioning said tax does not comply

with the law, in this, that it notifies persons to bring in an account of their ratable estates after instead of before the assessing of the same.

"12—Because said assessment having been made before the time for bringing in the accounts required by the assessors had expired, there is no appeal left to those who may be dissatisfied with said assessment.

"13—Because said assessors had no authority to accept from any person a list of names of persons to be assessed, and to assess said persons in a block, without describing and specifying the nature, kind and location of the personal property for which each of said persons was assessed, and that it was of the kind made taxable by law.

"14—Because said assessors had no authority to accept on the, to wit, the 14th day of July, A. D. 1911, a list of names of persons to be assessed, and to assess said persons on that date for personal property.

"15—Because the time limited in which persons and bodies corporate could bring in an account of their ratable estate to said assessors being the, to wit, the 10th day of June, A. D. 1911, said assessors were without authority to accept either the names of said persons or the accounts of said persons on the, to wit, the 14th day of July, A. D. 1911.

"16—Because said assessment being illegal and void, said Board of Canvassers had no jurisdiction to place the names of any of said persons upon the voting lists of said Central Falls as persons entitled to vote upon the payment of a personal property tax.

"THOMAS RILEY, JR.,

"H. J. CARROLL,

"Solicitors for Relators."

The respondents having been duly cited to appear and show cause why the prayer of the petition should not be granted appeared and filed the following motion to dismiss the petition:

"Now come the said respondents in said cause and move that said application for writ of certiorari may be dismissed:

"First: Because it does not appear that the tax roll as made up by said assessors violated any provision of the law in such cases made and provided.

"Second: Because it does not appear that the relator was either injured, misled or deceived by the assessment roll as made up.

"Third: Because it appears that said assessors properly assessed said tax upon the 6th day of June, 1911.

"Fourth: Because it appears that the notice set up by said assessors for bringing in statements of personal estate complied with the provisions of the law.

"Fifth: Because it does not appear that the relator or any other person was misled or deceived by the said notice.

"Sixth: Because it does not appear in and by said application, particularly in the allegations contained in the ninth and tenth paragraphs of said application, that said persons whose names are set out in Exhibits Nos. 4 and 5 did not at the time they were assessed for the sum of \$200.00, have and possess such amount of ratable personal estate.

"Seventh: Because it does not appear that the said Board of Assessors in taxing said persons whose names are referred to in the ninth and tenth paragraphs of said application for said writ exceeded their jurisdiction.

"Eighth: Because it appears in and by the eighth paragraph of said application that said Board, in placing the names of said one hundred and twenty persons mentioned in said eighth paragraph had sole jurisdiction to determine the questions of fact therein involved.

"Ninth: Because it does not appear from any allegation in said application, and particularly in and by the allegations of said eighth paragraph of said application, that said one hundred and twenty persons set out in said eighth paragraph of said bill did not, at said time, own and possess \$200.00 of ratable personal estate.

"Tenth: Because said Board of Canvassers in performing the several acts set out in the eleventh paragraph of said application acted in a ministerial and not in a judicial capacity."

Petitioner's exhibit No. 1 contains the following copy of "A resolution providing for the assessment and collection of a tax for the year 1911."

"(Passed May 1, 1911. Approved May 2, 1911.)

"Be it resolved by the City Council of the City of Central Falls, as follows:

"Section 1. The city council of the city of Central Falls hereby orders the assessment and collection of a tax upon the real and personal estate taxable by the city, at the rate of one dollar and fifty cents on each one hundred dollars of the value thereof, for the payment of the appropriations made by the city council, the ordinary and extraordinary expenses of the city, the sinking funds, the orders of the mayor, payments authorized by the resolutions and ordinances of the city council, payments otherwise authorized by law, and the payment of the state tax which is hereby assumed.

"Sec. 2. The board of assessors of taxes is hereby ordered to assess and apportion the tax provided for in the preceding section of this resolution, on the inhabitants and ratable property in the city on or before the thirty-first day of August, A. D. 1911, conformably to law.

"Sec. 3. The assessments provided for in Sections 1 and 2 of this resolution shall be committed to the collector of taxes on or before the first day of October next ensuing, and the several taxes thereon shall be payable to said collector of taxes on or before the thirty-first day of October, A. D. 1911, and shall be payable into the city treasury immediately upon receipt thereof by the collector of taxes.

"Sec. 4. On all taxes assessed as provided for in this resolution, and remaining unpaid on the thirty-first day of October next, interest shall accrue and be payable to said collector of taxes at the rate of eight per centum per annum

from and after the said thirty-first day of October, and all interest in addition to the taxes aforesaid shall be payable into the city treasury immediately after the receipt thereof by said collector of taxes.

“Sec. 5. This resolution shall take effect immediately.”

And the petitioner's exhibit No. 2 contains a copy of the Assessors' Notice, as follows:

“CITY OF CENTRAL FALLS.

“CITY TAX.

“ASSESSORS' NOTICE.

“Whereas, The City Council of the City of Central Falls, by resolution approved on the 2nd day of May, 1911, has ordered the assessment and apportionment of a tax on the real and personal estates of said city, of One Dollar and Fifty Cents on each One Hundred Dollars of the valuation thereof, to be assessed and apportioned on or before the 31st day of August, A. D. 1911. Now, therefore, notice is hereby given that in accordance with said resolution, and in conformity with the law in relation to the assessment of taxes, every person and body corporate liable to taxation is required to bring in to the assessors a true and exact account of all his ratable estate owned on the 6th day of June, A. D. 1911, at 5 o'clock p. m., describing and specifying the value of every parcel of his real and personal estate. For the purpose of receiving such accounts, the Board of Assessors will be in session at the City Hall, in said city, daily from the 6th to the 10th days of June, A. D. 1911, inclusive, from 9:30 a. m. to 12 o'clock noon. Every person bringing in any such account shall make oath before some one of the assessors that the account by him exhibited contains to the best of his knowledge and belief a true and full account and valuation of his ratable estate. And whoever neglects or refuses

to bring in such account, if overtaxed, shall have no remedy therefor.

"The said tax as ordered by the City Council of the City of Central Falls, will be assessed Tuesday, June 6th, 1911, at 5 o'clock p. m., and all real estate will be taxed to the persons or bodies corporate in whose name it stands by record at that time.

"The Poll Tax will also be assessed June 6th, 1911.

"DAVID BLOOMFIELD,

"JOSEPH J. CHAMBERLAIN,

"JAMES J. KELLEY,

"Board of Assessors of Taxes.

"Central Falls, R. I., May 13, 1911."

- As some of the questions submitted for determination in the present petition are substantially similar to, if not identical with, those which have been considered and decided by us, in the opinion heretofore rendered in the case of *William B. Greenough, Atty. Genl. ex rel. v. Bd. of Canv. & Reg. of Pawtucket, et als*, 33 R. I. p. 559, they will receive no further consideration at this time. The other questions raised have relation, first: to the power of the Board of Assessors to fix the time that they did, for the assessment of the tax of 1911, viz.: June 6, 1911, at 5 o'clock P. M., under
- (1) the resolution of the City Council of Central Falls which ordered said assessors to assess said tax on or before August 31st, 1911; second: to the legality of the notice given by the said Board of Assessors for persons to bring in accounts of their ratable estates from June 6 to June 10, 1911; third: to the action of said Board in declining to assess certain persons for personal property on or about the fifteenth day of June, 1911; and fourth: to the legality of the action of said board in assessing certain persons for personal property on or about the fourteenth day of July, 1911.

The petitioner argues that the city council by their resolution limited the time wherein the board of assessors of taxes should assess the tax for the year 1911, to the month

of August of that year. The resolution was passed May 1, 1911, and was approved by the mayor upon the day following, and by its fifth section took effect immediately. Under its terms the taxes therein referred to might be assessed by the board of assessors on the thirty-first day of August if they so elected, which they did not do. They were without authority to select a day for said assessment after August 31st, 1911. As they did not select the day named and could not select a later date, they were forced to select an earlier date. There is nothing in the language of the resolution that limits the board of assessors to select a day in any particular month other than August 31, 1911. Therefore, they had the right to select any day in August, July or June, provided that it was not too early and such as to prevent them from giving the requisite statutory three weeks' notice under Gen. Laws, cap. 58, § 6. The date selected was not faulty in this respect, and no question is made with regard to the publication of the notice. In our opinion, the board of assessors did not err in their selection of June 6, 1911, at 5 o'clock P. M., as the time for the assessment of the said tax.

- (2) The second question has reference to the first day when the board of assessors were to be in session to receive accounts of ratable estates. The information contained in the notice is that the board would receive such accounts daily from the 6th to the 10th days of June, 1911, inclusive, from 9:30 o'clock A. M. to 12 o'clock noon. It is evident that no such account could be received before noon on the 6th day of June, 1911, because it would be impossible for any person to know in the forenoon of or at noon on said day what property he would own at 5 o'clock P. M. of that day. In the case of *Matteson v. Warwick & Coventry Water Co.* 28 R. I. at p. 581 we held as follows: "It follows that the time for rendering an account must follow the day and hour established for the valuation and ownership of the ratable estate of the taxpayer in order that he may be able to render a true and exact account thereof as required by statute, and as has been the proper construction of the statute in some of the towns

- of the state. Thus to hold, however, is not to hold that taxes assessed and collected under provisions similar to the case at bar have been unlawfully collected. Having been paid without protest or objection in this respect, they must be deemed to have been lawfully collected and the objection waived which might have been successfully interposed against their enforced collection." The notice is faulty in this respect and it follows that any statements that may have been received by said assessors on June 6, 1911, between the hours of 9:30 o'clock A. M. and 12 o'clock noon are valueless. It does not appear, however, that any statements were then received or that any person has been misled by the defect in the notice. There was ample time provided for the reception of said accounts on the other days named, and this proceeding is not brought by any person for the purpose of obtaining relief from a tax illegally assessed against him. The defect in the notice therefore is of no avail to the petitioner. The action of the board in declining to assess certain persons for personal property on or about June 15, 1911, appears to have been based upon a ruling that it was then too late to bring in accounts of ratable estates to the board. It is true that the time for bringing in such accounts had expired, so that if such accounts were offered by any persons with the expectation of using the same as the basis for relief in case of over-taxation the board advised them properly and the ruling was correct. But the persons affected by the ruling are not parties to this proceeding which is brought for the purpose of causing certain names to be stricken from the assessment roll and not for the purpose of adding any names thereto. It is doubtless offered for the purpose of pointing out an unjust discrimination claimed to have been made by the board against those aspirants for taxation and in favor of certain other persons whose names were placed upon the assessment roll about a month later. The incident furnishes no ground for relief in the present proceeding. The proper remedy against assessors, who neglect or refuse to assess taxable persons or
- (3)
- (4)

property, is by mandamus to compel them to do so. 37 Cyc. 986, e. But the petition for such a writ must be brought against the assessors before the assessment roll has passed from their possession. *Sullivan v. Peckham*, 16 R. I. 525.

- (5) The fourth and last question to be considered is the one respecting the action of the board of assessors in assessing one hundred and twenty persons for personal property in the sum of two hundred dollars each on the fourteenth day of July, 1911. The statement is found in the eighth paragraph of the petition which recites that this was done by "a majority of the board against the objection and over the protest of the minority of said board." We do not understand from this that the completed assessment roll bearing the names of, and amounts assessed against, the one hundred and twenty persons aforesaid, was not signed by all of the members of the board of assessors. But we infer that the names aforesaid were included in the list by a vote of two assessors to one. It must often happen that questions arising in the course of their duties, in the assessment of taxes, are viewed from different standpoints by the individual members of the board and that there may be frequent disagreements that will necessitate a vote upon the subject thereof, and of necessity the vote of the majority will be decisive in each case, the minority voter usually acquiescing in the result. Such action is not the action of a majority. If two of the three assessors had attempted to act in the absence of the third, such action would constitute an action of the majority. The very fact that the minority member was present and objecting is sufficient to show that the full board was acting upon the matter in question. There is nothing in this phase of the question that calls for further consideration. No claim is made that the assessment roll had passed out of
- (6) the possession of the assessors at the time of the particular assessment under consideration. In the case of *Sullivan v. Peckham*, *supra*, at p. 526, Durfee, C. J., used the following language: "Our statute, Pub. Stat. R. I. cap. 43, § 3,

expressly declares that 'all property liable to taxation shall be assessed at its full and fair cash value,' and accordingly we think it is the duty of the assessors to tax every citizen rendering account to the assessors, as required, showing such property, unless they believe his account to be erroneous or defective, or unless he is in their judgment unable from infirmity or poverty to pay the tax, and they omit it on that account, under Pub. Stat. R. I. cap. 41, § 2." The learned judge was considering the case of one who had rendered an account and properly limited his decision to the facts of the case. But he called attention to the wording of the Statute which is identical with that of Gen. Laws, 1909, cap. 58, § 3, and the section contains no reference to an account. Moreover, said cap. 58, § 4, provides that "The assessors shall assess and apportion any tax on the inhabitants of the town and the ratable property therein, at the time ordered by the town." Thereunder it is the duty of the assessors to assess every person and all property liable to taxation. They are not excused from the performance of this duty in case no accounts are filed. Nor in case of the filing of accounts are they to be confined or restricted by the accounts rendered. Those are not prescribed as their only sources of information, for Gen. Laws, 1909, cap. 56, § 2, *inter alia*, contains the following provision: "The following property and no other shall be exempt from taxation . . . the estate of any person who in the judgment of the assessors is unable from infirmity or poverty to pay the tax." Such infirm or poor person may have property, may desire to be taxed and may render an account and yet in the judgment of the assessors may be too infirm or too poor to pay the tax, and the judgment of the assessors is made the controlling factor in the premises. Moreover, under said cap. 58, § 4, "If any person shall bring in an account as aforesaid, the assessors shall nevertheless assess such person's ratable estate at what they deem its full and fair cash value." The assessors are invested with power of appraisal which is to supersede, in the first instance, the sworn statement of the person rendering the

account. Much is entrusted to their judgment and discretion. They undoubtedly have the right to consider such information as they may be able to obtain from any available source for the purpose of using their judgment in assessing and apportioning a tax upon the inhabitants of the town and the ratable property therein. And their judgment in the premises can only be reviewed upon a petition for relief from such assessment brought, under the provisions of Gen. Laws, 1909, cap. 58, § 15, by a person who has duly rendered an account. In the circumstances of the case we are of the opinion that the conduct of the assessors in taxing the persons hereinbefore referred to in the amounts mentioned, before the assessment roll had passed out of their possession is not subject to review in this proceeding, and therefore and for the reasons already given, the motion to dismiss the petition is granted.

Petition denied and dismissed.

Thomas Riley, Jr., Hugh J. Carroll, for petitioner.

John N. Butman, for respondents.

Edward D. Bassett, of counsel.

NARRAGANSETT REAL ESTATE COMPANY *vs.* JUDSON C.
MACKENZIE, *et al.*

APRIL 12, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Trespass and Ejectment. Pleading.*

In an action of trespass and ejectment, where the possession of the premises is admitted by the defendant's pleas, it is unnecessary for plaintiff to prove it.

(2) *Waters. Riparian Rights. Tide Flowed Lands. Title.*

Pub. Laws, R. I. (1745-1752, p. 21), "An act for quieting Possessions and establishing Titles of Land, within the towns of Bristol, Tiverton, Little Compton, Warren and Cumberland," did not have the effect of bringing over into this State the Colonial Ordinance of 1641-1647 of the Massachusetts Bay Colony, giving the fee of tide flowed lands to the littoral

proprietor to low water mark, not exceeding 100 rods from high water mark.

(3) *Same.*

A plaintiff by proof of title to land bounding upon salt water in the town of Little Compton, has title in fee only to ordinary high water mark, and the fee to the land below ordinary high water mark is in the State.

(4) *Deeds. Construction. Waters. Wharves.*

A grant under an ancient deed, in consideration "that the inhabitants of the town of Little Compton having opened a highway of Two Rods wide," etc.,—"unto the sd. Town the following priviledges (among others)—at Fishing place Cove—to Land Wood Lumber and any other Commodity—for exporting any Commodity from said Cove;—Also the priviledge of building wharves in said Cove—"

Held, that the privilege of building wharves was granted to the inhabitants of the town and was not restricted to the town in its corporate capacity.

(5) *Deeds. Construction by Parties.*

Because of disputes as to the privileges granted under this deed, the then owner of the land entered into a rule of court, wherein the rights of the parties were submitted to referees, one of the questions submitted and the finding being as follows: "4. In what part or parts of said cove the said inhabitants have the right, if any, to build, erect, or maintain wharves?" "That a wharf or wharves may be built and maintained in any part or parts of said cove as above defined, at the pleasure of said town."

Held, that the question was a construction by the parties in interest of the terms of the deed and the finding was that such wharves might be built and maintained by the *inhabitants*.

(6) *Trespass and Ejectment. Waters. Highways. Nuisances. Riparian Rights. Wharves. Town Council.*

An inhabitant of Little Compton petitioned the town council for leave to build a wharf within that portion of the cove granted to the inhabitants under the above ancient deed, specifying the location. This petition was granted. Subsequently the General Assembly authorized the petitioner to build a wharf in the cove, "from the road or way," subject to the approval of the town council. This approval was granted. The wharf and a building adjacent thereto were supported upon spiles below ordinary high water mark, the only connection with the upland being by means of planks, used for entrance from a public highway. The planks were made a part of the highway and were not in any way an obstruction to travelers. This highway existed of the authorized width of 33 feet, bounded on the east by a wall and on the west by the waters of the cove and at the wharf and building the distance between the wall on the east and the line of ordinary high water on the west was several feet less than 33 feet, so that if the highway had been constructed its full width it would have extended westerly beyond ordinary high water mark. In an action of trespass and ejectment to recover possession of the land bounded westerly by the cove, together with the wharf and building projecting westerly into said cove:

Held, that the wharf and building rested upon soil, the fee of which was in the State and the plank approach was a part of the public highway, which defendants in common with the public had a right to use, the approach offering no obstruction either to the public or the plaintiff in the use of any land owned by it.

Held, further, that the privilege being originally granted to the inhabitants of the town, the function of the town council in granting the license to build the wharf, was in exercise of its general powers to manage the affairs of the town, having the effect merely of determining the location and size of the wharf and giving permission to connect it with a highway, and was in no sense a conveyance of property requiring the vote of a financial town meeting. It was a regulation of the exercise of the right rather than a grant of a right.

Held, further, that while there was no evidence as to whom the building belonged, or under what claim of right defendant held it, and while it might be a purpresture and its connection with the highway unauthorized by the town council, it did not follow that plaintiff was entitled to possession, for if it were a purpresture it might be abated on behalf of the state or if its connection with the highway infringed the rights of the public that might be the subject of action by the town, but as plaintiff had failed to show that it was upon land to which he was entitled to possession, a verdict for plaintiff was not warranted.

TRESPASS AND EJECTMENT. Heard on exceptions of both parties and exceptions of defendant sustained and exceptions of plaintiff overruled.

PARKHURST, J. This is an action of trespass and ejectment brought by the Narragansett Real Estate Company, a Rhode Island corporation, against Judson C. Mackenzie and William L. Winslow, both of Fall River, in the Commonwealth of Massachusetts, a copartnership doing business in said Fall River, and George Gray, of the town of Little Compton, in the State of Rhode Island. The premises for which this action is brought are described in the plaintiff's amended declaration and consist of a certain tract of land in the town of Little Compton, in the county of Newport, in this State, bounded westerly by Fishing Place Cove, together with a certain building and a wharf projecting westerly into said cove from said land.

The defendants' pleas consist of the general issue, and a great number of special pleas in which they admit their

- possession of the wharf and building and lands covered thereby, but attempt to justify that possession in various ways, either by claiming that title is not in the plaintiff, but is in one through whom they claim, or by setting up a claim of right, alleged by them to be derived from several different sources, to the possession of the wharf and building and lands covered thereby and a right to occupy the same, all in derogation of the plaintiff's title and right to possession. The pleas being of this character, it became unnecessary for the plaintiff to prove at the trial of the case the possession by the defendants of the wharf and building as this was admitted by the pleadings.
- (1) ing and lands covered thereby and a right to occupy the same, all in derogation of the plaintiff's title and right to possession. The pleas being of this character, it became unnecessary for the plaintiff to prove at the trial of the case the possession by the defendants of the wharf and building as this was admitted by the pleadings.

While the case was pending, but before its trial, William L. Winslow, one of the defendants, died. His death was duly suggested on the record by the plaintiff, and the executrix of his estate was made a party defendant in the case by consent of the other parties and by order of the court, and an appearance was entered for her by the attorneys representing the other defendants.

The case was tried before a justice of the Superior Court and a jury at Newport on October 5th-10th, 1910, and at the conclusion of all the evidence in the case the court held that there was no question of fact for the jury to pass upon, and thereupon directed the jury to find for the plaintiff as to the building or storehouse and the premises occupied thereby, and to find for the defendants as to the wharf and the premises occupied by it. The jury thereupon found as directed.

Thereafter, within seven days, the plaintiff and the defendants filed their respective notices of intention to prosecute bills of exceptions to this court, and both the plaintiff and the defendants ordered copies of the testimony. The bills of exceptions and the transcripts of the testimony were duly filed and allowed and the case is now before this court on the plaintiff's and on the defendants' respective bills of exceptions.

As the questions upon which this case is to be determined are fundamental questions relating to the titles and rights of the respective parties in the premises in dispute in this action, it will not be necessary to refer in detail to the numerous exceptions alleged in the respective bills of exceptions.

The whole evidence in the case shows that, while the plaintiff showed title in itself to certain lots of land described in the declaration bounding westerly on the salt waters of Fishing Place Cove, from a certain portion of which the wharf and the building extend westerly over the salt water, it plainly appears that over these lots there extends from the northerly to the southerly side thereof a public highway two rods wide; that such public highway at the place where the wharf and building are located, covers all of the upland between an old stone wall on the east and mean high-water line on the west; that, in fact, if the highway were built to its full width of 33 feet, it would extend westerly beyond high-water mark, for a distance greater than that covered by the east frontage of the wharf and building; it also appears conclusively that the wharf and building are built upon spiles, and that the spiles are all driven into the soil below high-water mark, and that the only portions of the building and wharf which rest upon the upland are the approaches thereto which rest upon the soil of said public highway at or near the line of ordinary high-water mark.

The plaintiff contends in a most elaborate argument that its proof of title to the upland carries the fee to low-water mark, on the ground that the land, as originally granted, lay within the jurisdiction of the colony of Plymouth, and was acquired by the first settlers under grants from that colony, pursuant to the laws thereof; that the colony of Plymouth was united to the colony of Massachusetts Bay under the province charter of 1692 and that thereafter the lands now within the town of Little Compton (and other towns) were considered as under the juris-

diction of the province of the Massachusetts Bay and that the laws of the colony of Massachusetts Bay were extended and applied to all the lands formerly within the jurisdiction of the Plymouth colony; that among the laws then in force in the colony of Massachusetts Bay was one that originated in an ordinance passed in 1641 and amended in 1647, which had been followed by usage and been recognized and enforced by the courts as a part of the common law. The amendment of 1647 was as follows: "The which clearly to determine: It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." (See Mass. Colonial Laws, 1672, rep. 1887, p. 90-91.) And plaintiff's counsel cites numerous authorities from Massachusetts to show that the above quoted ordinance was regarded as a part of the common law of that state regarding littoral ownership and was extended to cover all the lands formerly included within the bounds of Plymouth colony, as well as other lands under the jurisdiction of the province of the Massachusetts Bay, *Austin v. Carter*, 1 Mass. 231; *Com. v. Alger*, 7 Cush. 70; *Porter v. Sullivan*, 7 Gray, 443; *Boston v. Lecraw*, 17 How. 432; *Com. v. Roxbury*, 9 Gray, 451; *Codman v. Winslow*, 10 Mass. 146; *Barker v. Bates*, 13 Pick. 255; *Mayhew v. Norton*, 17 Pick. 357; *Lapish v. Bangor Bank*, 8 Greenl. 85. But it is not to be forgotten that for a long term of years, beginning shortly after the grant of the king to the colony of Rhode Island of the charter of 1663, claim was made by this colony that the lands lying easterly from the waters of Narragansett Bay and now included within the towns of Little Compton, Tiverton, Bristol, Barrington, Warren and Cumberland were

within the grant made by the king to this colony, and that the claim of jurisdiction thereof by Plymouth colony and by the province of the Massachusetts Bay should be set aside in favor of the colony of Rhode Island; and proceedings were had and continued for many years before the Privy Council in England and upon appeal to the King in council, beginning at least as early as 1734, until finally, an order in council, dated May 28, 1746, was issued, confirming by royal decree the decision of commissioners formerly made awarding the disputed territory to Rhode Island. (For a history of this controversy and of the final results thereof see Vol. II. Acts of the Privy Council, Colonial Series &c., published 1910.) The decision of this long standing dispute in favor of the colony of Rhode Island was a recognition of the rightfulness of Rhode Island's claim from the outset; and it became necessary, in view of the fact that these lands had been settled and occupied under grants made or authorized by the General Assemblies of the colonies of New Plymouth, or of Massachusetts Bay or of the province of the Massachusetts Bay, to pass an act for quieting possessions and establishing titles; accordingly such an act was passed by the General Assembly of the colony of Rhode Island (See Pub. Laws, R. I., 1745-1752, p. 21), as follows: "An Act for quieting possessions, and establishing Titles of Land, within the Towns of Bristol, Tiverton, Little Compton, Warren, and Cumberland." "Whereas agreeable to His Majesty's Royal Determination, there is lately taken into the Jurisdiction of this Colony, a considerable Quantity of Land, and a large Number of Inhabitants, of which the above-mentioned Towns consist, which have been long under the Jurisdiction, Laws and Constitutions, of the Province of the Massachusetts Bay; And the Titles of their Land, and manner of distributing Intestate Estates, are very different from the Laws and Customs of this Colony; so that great Injustice, Confusion, and Misery, must happen

to those Inhabitants, if timely Care be not taken to prevent the same.

“FOR REMEDY WHEREOF

“Be it enacted by the General Assembly of this Colony, and by the Authority of the same, It is enacted, That all Grants and Conveyances of Lands heretofore made by the General Assemblies of the late Colony of New-Plymouth, the late Colony of the Massachusetts, or by the Province of the Massachusetts-Bay, or by any Commissioners, Agents, or Persons by them, or any of them, duly appointed and authorized, or by any other Authority derived from them, or any of them, lying within any of the Towns aforesaid, shall be as good, valid, and effectual, to all Intents and Purposes whatsoever, to the Grantees, their Heirs or Assigns, as if the Lands so granted, had really been situated in the Colony or Province, by whom, or by whose Authority the same were made, and shall forever hereafter be so adjudged and construed, in all Courts of Judicature in this Colony.

“And be it further Enacted by the Authority aforesaid, That all Estates, both Real and Personal, left by Persons who have died Intestate, before the Publication of this Act, and which lie, or are within the Bounds of the aforesaid Towns, shall be distributed and settled among the Children, or legal Representatives of such Intestate, agreeable to the Laws of the Province of the Massachusetts-Bay, in Force at the Time of such Intestates Death, which laws shall have the same Force and Effect in this Colony, in the Tryal of, and settling and distributing such Intestates Estates, as if the same were Laws of this Colony duly made, and shall be so adjudged, construed, and understood by all Judges, and Ministers of Justice in this Colony: And that the several Town-Councils of the above-mentioned Towns, be, and they are hereby fully impowered and required to compleat the Distribution and Settlement of such Intestates Estates as aforesaid, which yet remain

unsettled, in the same manner, and as fully and effectually, in all Respects, as the same could have been by the Courts of Probate, had the said Towns still remain'd within the Province of the Massachusetts-Bay.

"And be it further Enacted by the Authority aforesaid, That all Grants, Deeds, Conveyances and Land Evidences whatsoever, that have heretofore been made of any Lands, within any of the aforesaid Towns, and which were executed and registered according to the Laws in Force there, at the Time of making the same, shall be adjudged and deemed as good, valid, and effectual, to all Intents and Purposes whatsoever, as if the same had been made, executed and recorded within, and according to the Laws of this Colony; And Copies of all such Grants, Deeds, Conveyances and Land Evidences, produced from, and attested by such offices and officers, where the same are registered shall be received as lawful Evidence, by all Courts in this Colony." See, also, Laws R. I. 1798, p. 469, Jan. 27. 1746.

The plaintiff earnestly contends that the effect of this act was to bring over into Rhode Island the colonial ordinance of 1641-1647 of the Massachusetts Bay colony, giving the fee of tide-flowed lands to the littoral proprietor to low-water mark, not exceeding 100 rods from high-water mark, and to make it applicable as a rule of property to all lands in the town of Little Compton (and other towns included in the act), because such had been recognized as the rule of law in the colony of Massachusetts Bay, and of New Plymouth. We are unable to agree with this contention, for the reason, first, that the colonial ordinance of 1641-1647 was an ordinance of the Massachusetts Bay colony, and the lands in Little Compton were claimed to be under the jurisdiction of New Plymouth colony; second, that there is nothing to show that said ordinance was ever adopted or recognized in New Plymouth, or that it ever became in force as to the lands rightfully under the jurisdiction of New Plymouth, so long as that colony existed as a separate organization, or in fact that it was ever re-

garded as a rule of property in that portion of the province of the Massachusetts Bay, until long after the lands claimed by the colony of Rhode Island had been decreed to belong to the said colony. There is nothing in the act above quoted to indicate that our Colonial General Assembly had in mind any such rule of property or any intention of adopting the same, and it is manifest from a careful reading of the whole act that its purport and intent were to quiet possessions and establish titles against all claims or questions that might arise from the change of jurisdiction (sub. 1) and particularly, which might arise as to the distribution of intestate estates (sub. 2), and as to proofs of title by record evidence (sub. 3). Our conclusion upon this branch of the case is, therefore, that the plaintiff, by its proof of title to the land bounding upon salt-water, has title in fee only to ordinary high-water mark, and that the fee of the land below ordinary high-water mark is in the State, as has always been the rule in this State, under our decisions. See *Engs v. Peckham*, 11 R. I. 210; *Aborn v. Smith*, 12 R. I. 370, 373; *Gerhard v. Bridge Commr's.*, 15 R. I. 334; *Allen v. Allen*, 19 R. I. 114, 115; *N. Y., N. H. & H. R. R. Co. v. Horgan*, 25 R. I. 408; *City of Providence v. Comstock*, 27 R. I. 537, 544.

The defendants claim that they have the right to occupy the wharf by virtue of the following facts: It appears that William Rotch, being one of the ancestors in title of the plaintiff, and being then the owner and in possession of the farm at Seaconnet, which included Fishing Place Cove within its boundaries, by his deed bearing date Nov. 11, 1796, granted certain privileges to the inhabitants of Little Compton, including the right to build wharves in Fishing Place Cove: the deed is as follows:

- (4) "Know all Men by these presents, that I, William Rotch of New Bedford in the County of Bristol & State of Massachusetts, for and in Consideration that the Inhabitants of the Town of Little Compton in the State of Rhode Island having opened a highway of Two Rods

wide from the main rode Leading into the neck and continuing as far as the North side of the Point Farm belonging to sd William Rotch and provided the said Town shall fence it at their own Expense, and keep the said Road open . . . I the said William Rotch do grant unto the sd Town the following previledges—Viz . . . a previledge at the Fishing place Cove exclusive of a Two Rod Road to the Cove, to Cart up Seaweed, and leave the same on the Beach to be carted away when most convenient. . . . Likewise to Land Wood, Lumber and any other Commodity whatever in the same manner . . . also an equal previledge for exporting any Commodity whatever in the same manner from said Cove . . . Also the previledge of building wharves in said Cove . . . Likewise the previledge of a driftway from said Fishing place Cove to the point on the upland adjoining the shore . . . And likewise a lot of half an acre of clear upland exclusive of Rocks, to be fences and the fence maintained by the Proprietor of said Farm, said land to be to the Notherd and Eastward of the high Rocks, and to be used for Graising only . . . Likewise a previledge for any of the Inhabitants of said Town, or other persons to Land in Boats on the Point, and to haul up their Boats on the Beach and to keep them there at their own pleasure, and for any of the Inhabitants of sd Town to Cart sand from the Beach on the Point. . . . But it is Considered that all the previledge of Manure or seaweed is reserved to the proprietor of said Farm, except what may be at the afore sd Fishing Place Cove, and that no previledge is given for any House Store or other building to be erected on the premises either at the said Cove or on the Point without liberty hereafter granted by the Proprietor of said Farm . . . And I hereby bind myself, my heirs & assigns to the continuance of the aforementioned previledges so long as the Inhabitants of the aforesaid Town of Little Compton shall at their own Expence keep the said Road open . . .

"In Testamony whereof I have hereunto set my hand and affixed my seale this Eleventh day of the Eleventh month One Thousand seven hundred and Ninety Six.

.. . . "

In construing the broad and general provisions of this deed as a whole it is manifest that it was the grantor's intention to give the privilege of building wharves in the most ample manner in aid of the other provisions permitting the landing of wood, lumber and any other commodity whatever and the exporting of any commodity whatever; and it must have been the grantor's intention that inhabitants of the town should exercise the privilege of building wharves, because it is inconceivable that such privileges should have been intended to be confined to the town in its corporate capacity. It would be a strained and narrow construction of this deed to hold that such general privileges of import and export, so manifestly convenient and necessary to the inhabitants, were intended to be exercised by the town alone, or that the privilege of building wharves in aid of such general privileges could only be exercised by the town as such. This court is of the opinion therefore that the grant of the privilege of building wharves was intended to be exercised by individuals, inhabitants of the town.

The record of evidence does not disclose whether this privilege of building wharves was, for many years after the date of this deed, exercised by the inhabitants, but it does disclose that many disputes arose between the subsequent owners of the land and the town as to the extent of the privileges which might be exercised by the town and its inhabitants under the terms of this deed, until finally it appears that in 1868, when said farm had become the property of David Sisson and wife, ancestors in title of the plaintiff, such disputes and suits had arisen between Sisson and wife and the town, that the parties entered into a rule of court in the Court of Common Pleas for Newport County, wherein the respective rights of the parties were

submitted to referees, whose report thereon, dated Nov. 18, 1868, and afterwards duly confirmed and judgment entered thereon, was as follows:

“REPORT.

“NEWPORT, SC.

“*To the Honorable Court of Common Pleas.*

“In the Matter of the Rule

“Between David Sisson and Wife
and

“The Town of Little Compton.

“The undersigned appointed Referees in said case by the agreement of the parties and the Commission of the Honorable Court hereto annexed

“Respectfully Report:

“That having been first duly engaged upon their said commission as appears by the Magistrates Certificate endorsed thereon they notified and met the said parties and their respective counsel who then and there submitted for arbitration the following questions and matters as in dispute between them viz.:

“*First.* What, if any, way, or right of way exists to Fishing Place Cove so called from the West end of the open highway leading from Bailey’s Corner to the North line of said Sissons farm, and what if any, gates bars or other obstructions said Sisson and wife as the owners of said farm have the right to maintain upon the same?

“*Second.* The extent and limits of said Fishing Place Cove.

“*Third.* The extent of the Beach of said Cove upon which the Inhabitants of said Town have the right, if any, to haul up and bapk or pile seaweed?

“*Fourth.* In what part or parts of said Cove the said Inhabitants have the right if any to build, erect or maintain a wharf or wharves?

“*Fifth.* What if any, way or right of way exists from said Fishing Place Cove along the upland next the shore

to the Horse Pasture so called and to Seaconnet Point. And if any such way or right of way exists, the relative rights and obligations of the parties respecting the same, especially with reference to the washing or wearing away of the same by the action of the sea.

"Sixth. What if any right exists to take sand from the shore or beach at or near Seaconnet Point?

"Seventh. What if any damages said Sisson and wife are entitled to recover for the removal heretofore of portions of their walls on or adjoining said ways as shown in evidence before referees?

"And after hearing and considering the respective allegations, evidence and arguments of said parties and their counsel upon the said several questions and matters submitted, we do determine and award as follows:

"First. That there exists a town way two rods wide through the farm of said Sisson and wife to said Fishing Place Cove from the West end of said open highway leading from Bailey's corner to said farm; and that the course of said town way through said farm is as marked out and defined upon the plat herewith returned and made a part of this report; And that said Town way is at all times to be left and kept open and unobstructed except that said Sisson and Wife their heirs or assigns, owners of said farm may keep and maintain suitable and convenient gates across the same, one at the East end thereof where the same opens at the line of said farm into said highway leading from Bailey's Corner and one at or near West end thereof where the same meets the wall of said farm next to said Fishing Place Cove as marked on said Plat.

"Second. That the limits of said Fishing Place Cove are defined by a straight line drawn across the mouth thereof from the most northerly point of the rocks upon the shore of Bluff Head so called (exclusive of the Breakwater) to the Westerly end of the South wall of the Six Acre lot so called on said Sisson's farm and as said line is drawn upon said plat in red ink and marked A B.

"Third. That the beach of said Cove upon which the Inhabitants of said Town have the right to haul up and bank or pile seaweed to be carted away at their pleasure is that portion of the shore of said Cove lying between ordinary high water mark and the turf land bordering said Cove and shifting as the same may from time to time shift or change from the action of the sea or other natural causes.

"Fourth. That a wharf or wharves may be built and maintained in any part or parts of said cove as above defined, at the pleasure of said Town.

"Fifth. That a driftway exists from the South Westerly part or corner of said Fishing Place Cove along the upland next the shore to said Horse Pasture and to Seaconnet Point—And the said Town of Little Compton shall at all times keep the surface bed of said driftway in ordinary and suitable repair as a driftway as against all injuries except those which arise from the action of the sea, destroying said roadbed or so impairing it as to render it unfit for use or travel. And if, whenever, and as often as, the said driftway shall be destroyed or impaired in any part so as to render it unfit for use or travel by the action of the sea the said Sisson and wife their heirs or assigns owners of said farm or the adjoining portions thereof, shall, as soon as may be either rebuild or repair the same, or shall throw out and leave open and unobstructed (setting back their shore wall if need be for this purpose) adjoining upland. So as at all times to leave an open driftway along the upland next the shore at least ten feet wide between their said shore wall and the edge of the shore bank.

"That the Inhabitants of said Town have the right at all times and for any and all purposes to take and cart away sand from the shore adjoining said Seaconnet Point at Pleasure.

"Seventh. That the said Sisson and wife are not entitled to recover any damages for any removal heretofore of any portions of their walls on or adjoining either of said ways."

- (5) It therefore appears that the fourth question submitted in the above reference, "In what part or parts of said Cove *the said inhabitants* have the right, if any, to build or maintain a wharf or wharves?" was a construction by the parties in interest, of the terms of the Rotch deed, and that the finding of referees in response thereto "that a wharf or wharves may be built and maintained in any part or parts of said cove as above described at the pleasure of said town," was a finding that such wharf or wharves might be built and maintained by "the inhabitants;" which is fully in accord with the construction given by this court, upon consideration of all the terms of the deed as above set forth.
- (6) It further appears in and by said report and plat filed therewith (Deft's Ex. 15) as well as by the Rotch deed and the proceedings of town meetings held after the date of said deed, that there had existed for many years a two rod road leading through the farm from the west end of the open highway to the Fishing Place Cove; the right to the use of this two rod road by the town was determined by the said report. Subsequently, by deed dated January 19, 1888, Henry T. Sisson and wife conveyed to the town of Little Compton a certain strip of land for highway purposes, thirty-three feet wide, "beginning at the west end of the road running from the Mansion House of the grantors, west to Fishing Place Cove (so-called), and running southerly, being thirty-three feet in width, along the line of a proposed street as delineated upon a plat surveyed by Clifton A. Hall," &c.; said deed was accepted by the town council March 26, 1888, and the road was laid out and used thereunder ever since as a public highway; and it further appears that that portion of said highway with which the easterly end of the wharf and the easterly side of said building are connected is practically in the same location as the old road which was in existence and in use as a public highway as above set forth prior to the date of said last mentioned deed, being bounded upon the east by an old stone wall, and upon the west by the salt water of Fishing

Place Cove; and it appears by the evidence that at the place mentioned, viz.: at the wharf and building, the distance between the old stone wall on the east and the line of ordinary high-water on the west, is several feet less than the width of thirty-three feet, so that if the highway were constructed at that place of the full width of thirty-three feet it would extend westerly beyond ordinary high-water mark. It further appears that in order to protect the highway from the action of the water, a sea-wall was erected some years ago, along the westerly side of said highway as actually constructed from the southerly side of said wharf for upwards of one hundred and fifty feet; and that the distance between said old wall on the easterly side of said highway and the line of said sea-wall at the location of the wharf and building is less than thirty feet.

It further appears that on February 8, 1902, James H. Shaw, an inhabitant and citizen of Little Compton, petitioned the town council of Little Compton for leave "to build, equip and maintain a wharf or pier on the east side of Church's Cove near Sakonnet Point in said town within that portion of the cove granted to the inhabitants of the town by deed from William Rotch, dated November 11th, 1796," . . . and to locate the same "about two hundred feet southerly from the Northerly side of the road or way, as it runs Westerly, leading to Fishing Place Cove." This petition was granted by the town council, February 10, 1902. Subsequently on the 12th day of March, 1902, a resolution of the General Assembly was passed, whereby said Shaw and his assigns were licensed "to build and maintain a wharf or pier in Little Compton, in tide-water, not exceeding four hundred feet in length from high-water mark, and fifty feet in width, which wharf or pier shall extend from the road or way, as it runs southerly, leading to Fishing Place Cove, on the easterly side of Church's Cove, near Seaconnet Point; Provided, that this license and privilege shall be approved by the town council of the Town of Little Compton." As the town council had already

granted this privilege to said Shaw, the approval of the town council provided for in the above resolution was purely a formality, and could have been treated as already given; but after the issue of the writ in this case, and before actual service of the writ, the town council did on the 8th day of February, 1909, pass a resolution approving the license and privilege granted to said James H. Shaw and his assigns by said resolution of the General Assembly.

It appears from a careful review of all the evidence that the wharf and the building known as the storehouse adjacent thereto are both supported upon spiles driven into the soil below ordinary high-water mark, the fee of which is in the State; and that the only connection of the wharf, and the building with the upland, is by means of planks used for purpose of entrance thereto from the public highway above described. These planks are made a part of the public highway and are not shown to be in any way an obstruction therein to the traveler thereon. The license given to Shaw and his assigns by resolution of the General Assembly was to build the wharf "*from the road or way,*" and this is what he has done.

It has been held that a wharf built from a public highway into navigable waters is an extension of a public highway (*The Empire State, Newb. Adm. Rep. 541*); and that where a private dock is built over a public street upon the shore of navigable waters, the dock becomes a part of the street and the public has a right to travel over it. (*City of Buffalo v. D. L. & W. R. R. Co.* 190 N. Y. 84.)

We find therefore upon all the evidence in the case that the wharf and building rest upon soil flowed by the tide below high-water mark, and the fee of such soil is in the State; that the plank approach to such wharf and building as a means of ingress thereto and egress therefrom is a part of the public highway, which the defendants in common with the public have a right to use, and that so far as the evidence shows such plank approach is no obstruction either to the public or to the plaintiff in its

use of any of the land owned by it. In our opinion the grant of the petition for leave to build and maintain the wharf to James H. Shaw, an inhabitant of the town, was properly made by the town council. As we have already decided, the privilege was originally granted to the "inhabitants," by the Rotch deed; the function of the town council, in its resolution giving the permission to build and maintain the wharf, was that ordinarily exercised by such a body, in granting a license, under its general powers to manage the affairs and interests of the town. Gen. Laws, 1909, Chapter 50, Section 4, provides: "The Town Council of each town shall have full power to manage the affairs and interests of each Town and to determine all such matters and things as shall, by law, come within their jurisdiction." It is merely, in effect, a license, which determines the location of the wharf, and its size, and gives permission to connect it with a public highway; it is not in any sense a conveyance of property, such as would require the vote of a financial town meeting; in fact, as we have seen, the right or privilege of erecting and maintaining the wharf was given by the deed to "the inhabitants," so that the license of the town council is, in effect, merely a regulation of the exercise of the right, rather than the grant of a right.

With regard to the building, there is no testimony to show by whom, when or under what circumstances the same was built, or to whom it belongs, and it is not clear under what tenancy or right or claim of right the defendant Gray holds the same; it appears that he pays rent to the "Shore Transportation Co.," but it nowhere appears in evidence what that company is or whether it has any connection with the other defendants who occupy the wharf. For all that appears in evidence, the building may be an entirely unauthorized structure, resting upon spiles driven into the soil, under tide-water, the fee of which is in the State and it may be a purpresture. Its connection with the soil of the public highway may be, so far as appears, entirely unauthorized by any act of the town council. But it does

not follow from this that the plaintiff is entitled to possession of it; if it is a public nuisance or purpresture, it may be abated, by proper proceedings on behalf of the State, upon whose soil it rests; if its connection with a public highway infringes the rights of the public therein (which does not appear), such connection or the cessation thereof may, perhaps, be the subject of action on the part of the town. But inasmuch as the plaintiff has failed to show that said building rests upon land to which it is entitled to possession, we are unable to agree, with the finding of the Superior Court, in its direction of a verdict for the plaintiff as to the building and the soil upon which it rests. Among all the vast number of cases cited by the parties, we find only one case, where a suit for trespass and ejectment has been sought to be maintained with reference to a structure built upon the soil covered by tide-water; in the case of *Coburn v. Ames*, 52 Cal. 385, where the owner of the upland sought to recover in an action of trespass and ejectment a wharf which was connected with the upland at a point where a public highway was supposed to have been laid out, but where as a matter of fact the layout was held to be invalid, the court refused to enter judgment in ejectment for that portion of the wharf which was below high-water mark. The court says (p. 396): "The plaintiff, however, contends that, being a riparian owner, he was entitled to wharf out to deep water in front of his land; and as incidental thereto that he has such a right to the possession below low-water mark as will maintain ejectment. We find it unnecessary to decide in the present case to what extent, if at all, and under what conditions, if any, a riparian owner is entitled, at common law, to wharf out to deep water; nor do we deem it material to determine whether Ames & Templeton acquired a valid right to construct the wharf and chute, in virtue of the proceedings before the Board of Supervisors. For our present purpose, we shall assume that the proceedings were null and void, and conferred no right to construct the wharf and chute, and shall further assume that the plaintiff, as a riparian owner, is entitled

to wharf out to deep water. This brings us to the question whether, on these assumptions, the plaintiff has such a right to the possession of the land below low-water mark as will enable him to maintain ejectment.

"We have been referred to no authority which supports the affirmative of this proposition, nor can it be maintained on principle. It is well settled in England that the *title* in the bed of the ocean is in the sovereign, subject to the *jus publicum*—the right of navigation and fishery—of which the public cannot be deprived. In this country, where the people are sovereign, the *title* to the bed of the ocean is in the State, which represents the sovereign power; and if obstructions are erected which materially impair the public right of navigation and fishery, they may be abated as public nuisances. But all encroachments on navigable tide-waters are not necessarily public nuisances. They may be of such a nature as not to obstruct the public right of navigation and fishery; and in that event the encroachment is what the law terms a *purpresture*—an unlawful intrusion upon the bed of the ocean, the *title* to which is in the sovereign. In such cases, it is for the sovereign authority to decide whether the public good requires that the obstruction be removed. In *People v. Davidson*, 30 Cal. 389, Mr. Justice Shafter, speaking for the court, said: 'If the soil in this case belongs to the State—and such is the theory of the bill—then the wharf, if erected, will belong to it also. The defendants will be unable to collect wharfage, and will have no rights except those belonging to the public at large. Possession of the land and wharf, should it be withheld, *can be recovered in ejectment*, and thereafter the wharf can be managed by the State, according to its own views of public good.'

"It seems clear from this authority, and on principle as well, that in a case where no question of riparian rights intervenes, the State may maintain ejectment for a wharf constructed without authority of law, in navigable tide-water below the line of low water. If there be, however, a riparian owner, in front of whose land the wharf is erected,

(as in this case) the question arises whether the right of action for the possession is in him or in the State. It cannot be in both at the same time. Assuming as we do, for the purposes of this decision, that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high-water mark, on the theory that at some future time he may possibly change his mind and desire to erect a wharf. On this theory he might capriciously refuse to erect a wharf at a point where the convenience of commerce demands it, and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this: that if he desires to wharf out, and is unlawfully obstructed in the exercise of the right, he may maintain an action for damages; and if the obstruction amounts to a public nuisance, it may be abated by appropriate proceedings for that purpose. If it be only a private nuisance which obstruct him in the exercise of his right to wharf out, he may possibly cause it to be abated by the appropriate method. But he has no such title or right to the possession of the bed of the ocean as will enable him to maintain ejectment. In this State, there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean, and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers, and wharves which are necessary for the convenience of commerce, nevertheless, in virtue merely of his riparian rights, might maintain ejectments for all such structures erected by others, which, when recovered, he might either demolish

or cease to use in aid of commerce, it is not difficult to foresee the disastrous consequences which would result from such a doctrine. It results from these views that the Court below erred in including in the judgment for the plaintiff the wharf and chute below high-water mark."

In *Gerhard v. Bridge Commr's*, 15 R. I. 334, where claimants of tide-flowed flats on the east bank of the Seekonk river sought compensation for the obstruction and occupation of such flats by the pier of a bridge, the court refused such compensation on the ground that the title was in the State, saying: "This court has decided that the title to the soil under tide-water is in the State, and that even the establishment of a harbor line does not transfer the fee to the riparian owner, but only operates as a license to him to fill out and incorporate the flats with the upland. We do not think, therefore, that Gerhard and wife can be held to have acquired under their lease any interest as against the State in the flats occupied by the bridge, and consequently we think that they are not entitled to compensation, the bridge having been built by authority of the State." If the parties could not recover compensation for the taking or obstruction of tide-flowed flats, it is impossible that they should be able to maintain trespass and ejectment to recover possession of them.

In view of the plain principle underlying the last cited cases, we are of the opinion that the plaintiff has shown no right to maintain its action in this case against any or either of the defendants. The exception of the defendant to the direction of a verdict for the plaintiff as to the building and the land occupied thereby is therefore sustained; the exception of the plaintiff to the direction of a verdict for the defendant as to the wharf and land occupied thereby is overruled, and the case is remitted to the Superior Court for the county of Newport, with direction to enter judgment for the defendants.

Gardner, Pirce and Thornley, for plaintiff.

William W. Moss, Hugh B. Baker, of counsel.

Sheffield, Levy and Harvey, for defendants.

CHARLES MUSK vs. EMMA M. HALL, et al.

MARCH 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Money Loaned. Evidence.*

In an action to recover for money loaned, it appeared that plaintiff was the step-father of the female defendant, and at the time of making the loans was living in their household. Defendants claimed the money was a gift: *Held*, that plaintiff might show in evidence that defendants brought an action against him for board, since under such circumstances without further explanation the relations of the parties might be presumed to be that of members of the same family, and evidence that they regarded his position as that of a boarder was relevant, as a basis for the argument as to the probability of a boarder making such gifts.

(2) *Evidence. Motive.*

A party may not be interrogated as to his reason for bringing a certain action, since the motives of the parties are presumed to be proper.

(3) *Money Loaned. Declarations of Wife.*

In an action for money loaned, evidence as to a conversation with the deceased wife of plaintiff in the absence of the plaintiff was properly excluded, where the wife was never a party to the suit.

(4) *Money Loaned. Evidence.*

In an action for money loaned, evidence as to the conduct of plaintiff, while living in defendant's household, was properly excluded.

(5) *Money Loaned. Evidence.*

In an action for money loaned which defendants claimed was a gift, witness for defendant testified that he had sold some land to plaintiff which latter deeded to one of defendants, and that at the time, plaintiff said he was buying the land for defendant and witness remarked that it would be a great present for her. He was then asked, "What was the reason you said it!"

Held, that while the language, silence and general behavior of the plaintiff on that occasion were relevant, evidence as to witness's reason for making the remark was properly excluded.

(6) *Executors and Administrators. Husband as Administrator of Wife.*

Where a husband has given bond as administrator of his deceased wife, to pay the just debts of the deceased, the personal property of the wife becomes his, and in an action to recover for money so derived and loaned to defendants he properly sues individually and not in his representative capacity.

ASSUMPSIT for money loaned. Heard on exceptions of defendants and overruled.

DUBOIS, C. J. This is an action of assumpsit brought by the plaintiff in the Superior Court to recover money alleged by him to have been loaned to the defendants. The plaintiff's bill of particulars contains nine items of sums loaned, including one for \$600.00, another for \$1,600.00, and still another for \$225.00, together with other amounts aggregating \$3,369.16. The defendants' plea is the general issue. Upon trial the defendants admitted that they received \$2,200.00, but claimed that the same was a gift from the plaintiff, and denied that they received any other amounts for any purpose whatever. The jury found for the plaintiff in the sum of \$2,473.50, the same being for the three items hereinbefore referred to with interest thereon from the date of the writ to the time of the rendition of the verdict. In the course of the trial the defendants took certain exceptions to the rulings of the court, to his charge to and refusals to charge the jury, and duly filed their motion for a new trial upon the grounds that the verdict is against the law and the evidence; that they did not have a full, fair and impartial trial; and that they have discovered new and material evidence decisive of the issues in said cause, which they had not obtained and could not by the exercise of due diligence have obtained before the trial or at the trial of said cause. This motion was denied by the justice of the Superior Court and to such denial the defendants took exception and have prosecuted their bill of exceptions to this court and the matter is before us for consideration upon the same.

The verdict was not against the law; the jury followed the instructions and rulings of the court which constitute the law of the case so far as the jury and their verdict are concerned. The verdict was not against the evidence, which was conflicting and raised questions to be determined largely by the weight to be given to the testimony of the

various witnesses, that is, the usual questions of credibility and veracity arose in the case. The verdict was approved by the justice presiding at the trial, and there is nothing to indicate that the jury were influenced by any improper motives in arriving at the verdict, or that the judge erred in sustaining the same. In these circumstances the rule referred to in the case of *Wilcox v. The Rhode Island Co.* 29 R. I. 292, governs and the verdict will not be disturbed. The trial judge properly ruled that if the defendants did not have a full fair and impartial trial on account of errors committed by him he was not permitted to review the same under the statute—Gen. Laws, 1909, cap. 298, §12—and that the same was not appropriate as a ground in a motion for a new trial. He also rightly ruled that the affidavits relating to newly discovered evidence could not be regarded as furnishing evidence that could properly change the verdict. The court, therefore, did not err in denying the defendants' motion for a new trial.

The defendants also rely upon their first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh exceptions, which read as follows:

"*First.* The Court erred in admitting testimony as to the substance of a pending suit brought by the defendants against the plaintiff, to which exception was taken, as shown on page 8 of the transcript.

"*Third.* That the Court erred in admitting testimony as to the particulars of a suit brought by the defendants against the plaintiff, to which admission an exception was taken, as noted on page 93 of the transcript.

"*Fourth.* That the Court erred in excluding testimony offered by the defendants, to which exception was taken, as noted on page 95 of the transcript.

"*Fifth.* That the Court erred in excluding the testimony of Mary Hall as to the declarations of Mary T. Musk in her lifetime, to which exception was taken, as noted on page 98 of the transcript.

"Sixth. That the Court erred in excluding testimony offered by the defendants as to the conduct of the plaintiff while living in the defendants' house to which exception was taken, as noted on page 104 of the transcript.

"Seventh. That the Court erred in excluding testimony offered by the defendants as to the statements and conversations of Mary T. Musk made in her lifetime, to which exceptions were taken, as noted on page 119 of the transcript.

"Eighth. That the Court erred in excluding the testimony of Edward Drew, to which exception was taken, as shown in question 21, on pages 124 and 125 of the transcript.

"Ninth. That the Court erred in refusing, upon motion of the defendants, to strike out question and answer 192, on page 154 of the transcript, to which exception was taken, as noted on said page.

"Tenth. That the Court erred in refusing to direct a verdict for the defendants, to which exception was taken, as noted on pages 168 and 169 of the transcript.

"Eleventh. That the Court erred in that part of his charge to the jury relating to the testimony of a contract or agreement or a statement of the plaintiff with reference to the keeping of the plaintiff by the defendants for life in consideration of a payment by him to the defendants of the money sued for, to which exception was taken, as indicated on page 181 of the transcript."

- (1) The first exception relates to the following question put to the plaintiff, by his counsel, in direct examination: "47 Q. Now, when you were put out of the defendants' house was any suit started against you by them?" This was objected to by the counsel for the defendants and, after some discussion, the court ruled as follows: "I don't see that it is very material from your side of the case, but you may show the fact they have brought an action for board and stop there, that is all." The question was then repeated, but not answered, as the plaintiff said he did not hear it. He was then asked the same question, save tha

the initial word "now" was omitted therefrom, and he made answer as follows: "A. One before I did start—before they did put me out. 50 Q. And what was that for? A. For \$1,500.00 for me board." It appears from the evidence that the plaintiff is the step-father of the female defendant, having married her mother, and that at the time of making the loans for which he has brought suit he was living in their household. In such circumstances, without further explanation, the relations of the parties might be presumed to be those of members of the same family wherein friendly offices were exchanged, gifts and other gratuities made and received, without expectation of repayment or reward other than that of an approving conscience and that harmony in the family relations that is the result of little words of kindness and little deeds of love. This presumption, however, like all other presumptions yields to proof, and evidence that he loaned them the money, which they claim he gave them, is indicative of his position in that particular. And evidence that they regarded his position in the household to be that of a boarder, rather than that of a member of the family, has some bearing upon the matter in dispute. Whether a mere boarder would be likely to be making gifts of large sums of money to the persons with whom he was boarding was a fair subject for argument in the trial of the case. The court very properly limited the scope of the question and we find no error in his ruling. The exception is without merit and is therefore overruled.

The third exception relates to a question propounded in cross-examination to Emma M. Hall, one of the defendants, by counsel for the plaintiff, as follows: "337 Q. Did you sue him for the period he had been boarding with you? MR. DEVLIN: I think he may show there was a suit, but I don't think he can show when he brought it; that isn't in question. THE COURT: That question was put to the plaintiff, if he hadn't been sued for board. I think I shall allow that to show the respective claims. I don't think it is very important. Exception taken by

Mr. Devlin." The following question was then asked the witness: "Did you and your husband sue Mr. Musk for board after his leaving there? A. It was during the week he was away." For the reasons given regarding the first exception the third exception is also overruled.

(2) The fourth exception relates to the ruling of the court in excluding the following question asked of Emma M. Hall, by her counsel, in redirect examination: "343 Q. You have been asked, Mrs. Hall, about a suit commenced against Mr. Musk for board; will you tell us why that suit was commenced?" The court properly excluded the question, the motives of the parties are presumed to be proper. If board was due and unpaid they had the right to bring suit for the same. The only materiality of the evidence introduced upon this subject was to show that the defendants regarded the plaintiff as a boarder and had sued him for board. The fourth exception is overruled.

(3) The fifth exception has reference to a question asked of Mary Hall, daughter of the defendants, relative to a conversation relating to money had with Mrs. Musk, now deceased, in the absence of her husband. The question was properly excluded; Mrs. Musk was never a party to the suit; the defendants claim the plaintiff gave them the money and he could not be bound by any declarations of his wife made in his absence. The fifth exception is overruled.

The seventh exception was taken to a ruling excluding a similar question relating to Mrs. Musk's statements about money, in the absence of Mr. Musk, asked of William Henry Millar, a son of the defendant Mrs. Hall. The seventh exception is overruled for the same reasons given concerning the fifth exception.

(4) The sixth exception was taken to a ruling of the court in excluding the following question put to Mary Hall: "51 Q. I will ask you if you were sent for by your mother and came home to the house and found Mr. Musk conducting himself in an improper or abusive way and what was

he doing at the time?" The court had already ruled, p. 103: "That wouldn't prevent his right to recover the money if he loaned it, so I don't see it is necessary to go into it at any great length. If there is anything you want to say I will let the jury retire. The question of your right to say he shouldn't stay there any longer isn't denied. MR. GAINER: We don't deny it, your honor. THE COURT: Therefore, they had a right to say he shouldn't stay there, whatever might be their reason, it was their house." The ruling was correct and the sixth exception is overruled.

- (5) The eighth exception related to a ruling by the court which prevented Edward Drew, a witness for the defendants, from testifying as to his reason for making a certain remark to Mr. Musk. The witness had testified that he and his wife had owned some land that was bought by the plaintiff and deeded to Mrs. Hall, the defendant, that at the time of the purchase Mr. Musk said he was buying this land for Mrs. Hall, and that he, the witness, made the remark that it would be a great present for Mr. and Mrs. Hall. He was then asked: "19 Q. Did you make that remark, Mr. Drew? A. I made that remark. 20 Q. And nobody else? A. Nobody else. I made that remark and the reason I made that remark— 21 Q. (By Mr. Devlin.) What was the reason you said it? THE COURT: That isn't material, what he had in his mind. MR. DEVLIN: If the reasons are so as to show that was a conclusion and that we could arrive at the same conclusion, it would help us. THE COURT: He made the remark in the presence of Mr. Musk and he said Mr. Musk didn't say anything. Suppose he thought various things, what is there material about it? The question is as to the intention of Mr. Musk, that's all. I will rule it out. That is so plain it isn't worth talking about. Exception taken by Mr. Devlin." The language, silence and general behavior of the plaintiff on that occasion were proper subjects for the consideration of the jury. The appropriateness of the remark made by Mr. Drew is neither the subject of attack or defense in the

present case and needs no further consideration. The eighth exception is overruled.

The ninth exception has reference to the ruling of the court in refusing to strike from the record the following question and answer asked of Charles H. Hall, defendant, in cross-examination: "192 Q. You would think he would lock up his own money? A. Yes, I would think so." Motion by Mr. Devlin to have the last question and answer stricken out. THE COURT: I think I will let that stand, it is in connection with the previous question and answer." The previous question and answer referred to by the court were: "191 Q. What made you think it was? A. He had a key of it and you might think it would be locked." The foregoing had reference to a money box that the plaintiff had. We find no error in the ruling and the ninth exception is therefore overruled.

The tenth exception is to the refusal of the court to direct a verdict for the defendants upon the ground that there is a variance between the proof and the declaration. The defendants try to interpret the claim of the plaintiff as if it was for the breach of a special contract made with them whereby for the money given them by the plaintiff they were to take care of him as long as he lived. The plaintiff testified concerning his loans to them as follows: "31 Q. And how did you come to make this first payment? (To Famiglietti for building a house for defendants on the lot he had loaned them the money to buy.) A. Because they couldn't get any money anywhere else and they knowed I had it and they just wanted to get it out of me. 32 Q. What did they say when they came for it? A. I might as well let them have it as hold it myself and they would look after me as long as I lived and whenever I wanted it they would give it to me back." It is argued that this means that he was not to charge them for the use of the money, but was to receive a home and lodging as the equivalent for its use, and was entitled to receive the principal on demand therefor. On cross-examination the plaintiff testified: "234

- Q. Well, then, what did you mean in answering the questions of Mr. Gainer by saying they were to keep you as long as you lived? A. For the money I loaned them they was to keep me. 235 Q. For the money you loaned them they was to keep you as long as you lived? A. They was to keep me as long as I lived. 236 Q. Did you have that arrangement with them? A. According to their agreement to that effect. 237 Q. That was how you came to give them the money, on their agreement to keep you as long as you lived? A. Why, sure. They couldn't get the money anywhere else and they had none themselves and they made a proposition I might just as well let them have the money to do it and I would never want, they would look after me. 238 Q. So it was upon that condition or upon that arrangement that you gave them this money, paid it out? A. Certainly it was." The defendants testify that there was no loan, and no agreement to take care of the plaintiff as long as he lived in payment of either principal or interest of the money received, but that the same was purely a gift. The plaintiff's claim as he made it is not unreasonable and it cannot be said that the jury would not be justified in taking that view of it. According to his claim as evidenced by his bill of particulars he had advanced or loaned to the defendants \$3,369.16, which at 6 per cent. interest would produce \$203.10 per annum. Board at \$4 per week would amount to \$208. An examination of the evidence submitted shows no variance between the proof and declaration. The second ground urged upon
- (6) this motion was that the title to the money loaned was in the plaintiff as administrator of his wife's estate and that he should have brought suit in a representative capacity and not for himself individually. There is nothing in this claim. As appears by the papers introduced in the case the plaintiff gave bond with the defendant Emma M. Hall as surety to pay the just debts of the deceased. Upon so doing the personal estate that formerly belonged to his wife became his property under Gen. Laws 1896, cap. 194,

§ 9; cap. 212, § 9 and cap. 220, § 6. See *Kenyon v. Saunders*, 18 R. I. at p. 593. We held in the case of *Adams v. Probate Court of Central Falls*, 26 R. I. at p. 244: "An executor who is also residuary legatee may give bond to pay the funeral charges, debts, and legacies, and, having done this, he may take possession of the assets as his own property and dispose of them as he sees fit to his own use. He may pay the debts and legacies either out of the assets or out of his own estate. Neither the court nor the legatees are concerned with his management of the estate or with its fortunes, or can call him to account therefor after it passes into his hands. If losses occur, the executor must bear them. If the property increases in value the profit is his. To all intents and purposes the bond stands in place of the estate. These obligations are not elements of an agreement between parties, but are provisions of general law." This is no less true in the case of a husband who has given the statutory bond. There is no merit in the motion for the direction of a verdict and the same was properly overruled. The defendants' tenth exception is overruled. The defendants' eleventh exception was taken at the close of the charge of the court as follows: "MR. DEVLIN: The defendant takes exception to that part of the charge of the court relating to the testimony of any contract to keep the plaintiff for life." This is in effect an exception to the charge of the court either as misstating testimony or as attempting to draw inferences therefrom. A careful examination of the charge discloses no error in relation to the same and the eleventh exception is therefore overruled.

All of the defendants' exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the verdict.

O'Shaunnessy, Gainer and Carr, for plaintiff.

John I. Devlin, Daniel P. Macdonald, for defendant.

JOHN A. TILLINGHAST, Trustee vs. FRANK W. JOHNSON.

APRIL 15, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Garnishment. Safe Deposit Companies. Sealed Package.*

A safe deposit company which has received for storage articles in a sealed parcel owned by the defendant in an action in assumpsit, and has such parcel in its possession at the time of the service upon it of a writ of garnishment, the contents not being of a nature exempt from attachment, is chargeable as garnishee whether or not any of its officers or employees were informed as to the contents of said package.

If under such circumstances the garnishee has refused or neglected to render the account required by Gen. Laws, 1909, cap. 301, § 10, it should be charged under cap. 301, § 20, because of such refusal or neglect.

(2) *Certification of Question of Law.*

General Laws, 1909, cap. 298, § 5, intends that only questions of law which have in fact arisen in some proceeding pending in a lower court, prior to the trial of such proceeding on its merits, shall be certified for determination. It is not enough that such question may arise later, but it must be one actually presented and one the determination of which is necessarily involved in the ruling of the court upon the particular phase of the case then before it. If it must be based upon a particular state of facts found to exist, such underlying facts must be determined by the court, and such question should not be certified except in the case where the court after careful consideration, aided by counsel, is unable to reach a satisfactory conclusion and the question still appears a doubtful one.

(3) *Certification of Question of Law. Garnishment.*

Where a question of law certified for determination sets out that the contents of a sealed parcel "were not exempt by law from attachment," the court must have found what such contents were, in order to have determined that fact, and where it appeared that the garnishee was ignorant as to the contents the court must have determined such fact upon other evidence than the return of the garnishee, and there being no transcript of testimony the appellate court must presume that the court below was justified in its finding, from testimony given before it in some hearing to determine whether the garnishee was properly chargeable, otherwise the fact should not have been incorporated in the question.

(4) *Garnishment. Examination of Garnishee.*

The trial court, under present statutory provisions has as ample jurisdiction in an examination as to the liability of a garnishee, as in most other matters presented for its determination, and the construction of the provisions, now

constituting Gen. Laws, 1909, cap. 301, § 18, given in *Raymond v. Narragansett Tinware Co.* 14 R. I. 310, has now no application.

(5) *Garnishment. Sealed Package. Safety Deposit Box.*

Where a garnishee appears and answers, disclosing that he has in his possession a sealed parcel or a locked safety deposit box belonging to defendant, the contents of which are unknown to him, the person signing the garnishee's affidavit may be summoned by either party and examined and cross examined with reference to his answer and his testimony may be contradicted. Also, under cap. 301, § 18, the court may take such action as will enable it to determine the liability of the garnishee, and this would warrant it in directing the garnishee to break the seal of the parcel or open the deposit box and inspect the contents, that he may disclose the same to the court, and enable it to determine as to whether he is chargeable and to what extent. The garnishee may be reimbursed for his expenses under cap. 301, § 27.

(6) *Jurisdiction. Garnishment. Sealed Package. Procedure.*

Where the jurisdiction of the court does not depend upon whether or not there is property of the defendant in the hands of the garnishee, the order upon the garnishee to open a sealed parcel or a deposit box may be delayed until after verdict or decision against defendant, the only requirement being that it shall be before or at the time of the entry of final judgment in the case, and the court may continue the case after verdict or decision and suspend the entry of final judgment that it may have sufficient time to determine such liability.

(7) *Jurisdiction. Garnishment. Sealed Package. Procedure.*

Where the jurisdiction of the court does depend upon the attachment of property of defendant in the hands of a garnishee the court will continue the case under Gen. Laws, 1909, cap. 288, § 1, and if at the expiration of such continuance, the defendant has not answered, and the affidavit of the garnishee discloses no property except such as may be in a sealed or locked receptacle of defendant, the contents of which are unknown to him, the court upon motion of plaintiff or garnishee may for the double purpose of determining its own jurisdiction and the chargeability of garnishee inquire into the contents, and if necessary order garnishee to open the receptacle.

(8) *Garnishment. Safety Deposit Box.*

Where a defendant in an action of assumpsit, by contract with a safe deposit company, has the right to the exclusive use of a safe deposit box, owned by said company, and in the vault of said company, subject to the general control of the company, and the box except by force, can be opened only by the joint use of a master key retained by the company and of a key in possession of defendant and said box contains at time of garnishment property not exempt from attachment, the company is chargeable as garnishee, whether or not the employees of said company are informed as to the contents of said box, for the boxes are in possession of the garnishee in the sense that the words are used in the statute, and this being so, then the contents, though the owner has attempted to bar access to them are in the garnishee's possession also and subject to garnishment.

ASSUMPSIT. Heard on certification of questions of law.

SWEETLAND, J. Four questions of law arising in this case have been certified by a justice of the Superior Court to this court for determination. The first of these questions is: "*First*: If a Safe Deposit Company has received for storage articles in a sealed parcel owned by the defendant in an action in assumpsit, which parcel the said Company, at the time of the service upon said Company of a writ of garnishment in said action had in its hands or possession, and the contents of said sealed parcel are not of a nature exempt by law from attachment, is the said Company chargeable as garnishee by reason of its possession of said sealed parcel.

- (1) If any of the officers or employees of said Company were informed as to the contents of said package? (2) If none of the officers or employees of said Company was informed as to the contents of said package? This question is silent as to whether the garnishee has or has not rendered to the Superior Court an account in writing as required by Chap. 301, Sec. 10, Gen. Laws, 1909. If the garnishee has refused or neglected to render such account it should be charged, not by reason of its possession of said sealed parcel, but because of such refusal or neglect. Chapter 301, Sec. 20, Gen. Laws, 1909.

If the garnishee has rendered an account in writing or has appeared in the cause and has asked the court to determine whether or not it is chargeable as a trustee of the defendant, then in the circumstances set out in the question the garnishee is chargeable as trustee of the defendant, in the circumstances stated, in either subdivision of the question presented.

Although from the argument of counsel before this court it appeared that they had a different understanding of the fact, we must presume from the question propounded by the Superior Court that there are at least two sealed packages involved in the case as to the contents of one of which the garnishee is informed and as to the contents of the other

it is ignorant. Otherwise one of the subdivisions presented is a moot question and should not have been certified for the determination of this court.

- (2) Chapter 298, Sec. 5, Gen. Laws, 1909, under the provisions of which these questions are certified, clearly intends that only questions of law which have in fact arisen in some proceeding pending in a lower court, prior to a trial of such proceeding upon its merits, shall be certified here for determination. To warrant the certification of a question of law it is not enough that in the opinion of a justice of the Superior or of a district court such question may arise later in the case. To be a question of law, the certification of which is contemplated by the statute, it must be one actually presented to said justice, and one the determination of which is necessarily involved in his ruling or decision upon the particular phase of the case then before him. *Fletcher v. Board of Aldermen*, 33 R. I. 388. More is required than that it should be a question upon which the justice is unwilling, at the time of the hearing, to make an immediate ruling without further consideration. For, in the broad field of the law, there are many questions which when first presented may appear full of difficulty, but which upon deliberate examination lose their perplexity. Hence it is only after careful consideration, aided by the arguments and the researches of counsel, when the justice is then unable to reach a satisfactory conclusion and the question still appears doubtful to him, that the justice can properly consider the question, in the language of the statute, as of "such doubt . . . that it ought to be determined by the Supreme Court before further proceedings." *State v. Karagavoorian*, 32 R. I. 477. If, as in the matter now under consideration, questions of law which arise must be based upon a particular state of facts found to exist, before the justice can properly frame his questions of law for certification, he must determine the underlying facts, otherwise the questions of law certified can not be said to have arisen, and may never arise in the case.

- (3) By the terms of the question the contents of the sealed package or packages "are not of a nature exempt by law from attachment." To determine that fact the Superior Court must have found what said contents were. In the case of the package or packages, as to the contents of which the officers and employees of the garnishee are ignorant, the court could not have based this finding upon the return of the garnishee, but must have determined that fact upon some other evidence. From the arguments of both counsel before us it would appear that there was nothing before the Superior Court which warranted the finding; and that the difficulty confronting the court and the counsel was as to how far the court's investigation might go in a proceeding which sought to disclose the contents of a sealed parcel, in the possession of a garnishee, when the contents of such sealed parcel were unknown to the garnishee. There is, however, no transcript of the testimony before us; and we must presume that the court below was justified in its finding as to the nature of the contents of such package or packages, from the testimony given before it in some hearing to determine whether the garnishee is properly chargeable, otherwise that fact should not have been incorporated in the question. In the argument before us counsel for the garnishee has questioned the power of the Superior Court, under the statute, to carry its investigation as to the chargeability of a garnishee to the point of obtaining a discovery of the contents of a sealed package or a locked safety deposit box, belonging to the defendant and in the possession of a garnishee, especially if the garnishee is uninformed as to said contents.

By statute the jurisdiction of the trial courts in regard to such investigations has been extended from time to time. Under Gen. Stats. 1872, Chapter 197, Secs. 12 and 13, the person making oath to the garnishee's return might be examined by either party upon written interrogatories, which were to be answered by said person in writing under oath, and the liability of the garnishee was to be determined entirely from the disclosures of the person making such oath.

There was at that time no provision in the statute providing a civil liability for making a false answer or affidavit in garnishment proceedings. By Pub. Laws, Chapter 673, passed April 12th, 1878, it was provided (Sec. 4) that any person, summoned as trustee of a defendant in a case, making a false answer or affidavit should be liable to the plaintiff in such case for any damages resulting to the plaintiff from such false answer or affidavit. Said Chapter 673 also introduced the following additional provision in garnishment proceedings, now Sec. 18, Chap. 301, Gen. Laws, 1909: "Whenever any person shall be served with a copy of a writ by which he shall be sought to be charged as trustee of the defendant named therein, and such person shall appear and answer to the action so commenced as to whether he is, or is not, a trustee of the defendant, the court in which such action is brought or may be pending, shall determine whether the person so served is properly chargeable as the trustee of the defendant, and if chargeable, to what extent." This provision was construed in *Raymond v. Narragansett Tinware Co.*, 14 R. I. 310. In that case the garnishee by affidavit, filed in the lower court disclosed funds in his hands. It was sought to have the garnishee discharged on the ground of a general assignment for the benefit of creditors made by the defendant before the garnishment. Under its interpretation of the provisions of said Public Laws, Chapter 673, Sec. 1, at the time of the trial Pub. Stat. Chapter 208, Sec. 10, the trial court heard oral testimony as to the validity of said assignment and discharged the garnishee. The Supreme Court held that "the court below committed an error in hearing the oral testimony. The proceeding in cases of garnishment is purely statutory. The statute prescribes the mode in which the liability of the garnishee is to be determined when he appears and makes affidavit, namely, by his affidavit, and by his written examination supplementing it, if such examination be taken." With reference to said Sec. 10, Chapter 208, the court further said: "It provides that when the garnishee appears and answers

'as to whether he is or is not a trustee of the defendant,' the court shall determine whether he is chargeable, and if chargeable, to what extent. The purpose of the provision was not to change the mode in which the liability of the garnishee is to be determined, but only to enable the plaintiff to have him charged in the original action. To allow his liability to be determined by extrinsic testimony would be to allow one case to be litigated in another, and that, too, without any pleadings or the right of jury trial. It cannot be supposed that this was intended. In the case at bar the only competent testimony before the court was the affidavit of the garnishee, Charles M. Raymond, and upon that the garnishee ought to have been charged."

At its next session the General Assembly (January session, 1884), passed Public Laws, Chapter 433. Sections 2 and 3 are as follows: "Sec. 2. The answer sworn to by a trustee shall be considered true in deciding how far said trustee is chargeable, but either party to the suit, or any claimant of the estate so attached, may allege and prove any facts not stated nor denied by said trustee that may be material in so deciding.

"Sec. 3. Any question of fact arising upon such additional allegations may be tried and determined by the court or justice, and in the court of common pleas and in the Supreme Court the same may be submitted to a jury in such manner as the court shall direct."

Chapter 1432, Sec. 1, Pub. Laws, January session, 1907, now Chapter 301, Sec. 12, Gen. Laws, 1909, still further extended the scope of the hearing before the lower courts. Sec. 1, in part provides as follows: "Section 1. Section 578 of the 'Court and Practice Act' is hereby amended so as to read as follows:

" 'Sec. 578. In any action where money or other property shall have been trusted in the hands of a person, firm, or corporation, the person signing the garnishee's answer may be summoned by either party at any time before final judgment and subjected to examination and cross examination

upon all matters relating to or connected with the facts set forth in such answer, and evidence may be introduced to contradict the testimony of such person.'"

- (4) The power of the trial court has thus been enlarged, until under the present statutory provisions it has as ample jurisdiction in an examination as to the liability of a garnishee, as it has in most other matters presented for its determination. The construction of the provisions, now constituting Sec. 18, Chapter 301, Gen. Laws, 1909, given in *Raymond v. Narragansett Tinware Co.*, 14 R. I. 310, *supra*, has no application now, as that construction was based upon other statutory provisions now repealed, but then in force, which limited the examination of the court to a consideration of the garnishee's affidavit or his written answer given to interrogatories, none of which was open to explanation or contradiction by other testimony. Under the present condition of the statute, if a garnishee appears and answers as to whether he is or is not a trustee of the defendant, setting out the facts as he claims them to be and discloses that he has in his possession a sealed parcel or a locked safety deposit box belonging to the defendant, the contents of which are unknown to him, the person signing the garnishee's answer may be summoned by either party and may be examined and cross-examined with reference to his answer and his testimony may be contradicted. Also, under said Section 18, Chapter 301, Gen. Laws, 1909, the court may take such action, in accordance with proper legal procedure, as will enable it to determine the liability of the garnishee. This would warrant the court in directing the garnishee to break the seal upon such parcel or to open such safety deposit box and to inspect the contents thereof, that he may disclose the same to the court, and thus enable it to determine as to whether the garnishee is chargeable and to what extent. A sheriff charged with the service of a writ of attachment or an execution would have authority
- (5) to attach or to levy upon a sealed parcel or a safety deposit box, belonging to the defendant, if he was able to find the same within his precinct, to open either of them to inventory

the contents and if the same was taken upon execution to sell sufficient of the contents, not exempt from attachment, to satisfy such execution. In the case of *The United States v. Graff*, 67 Barbour, 304, the court considered an appeal from an order directing the sheriff to open a safe and a tin box, in the custody of a trust company, in which safe and box it was claimed that the defendant had property and securities on deposit, and to take and keep such of said property and securities as were liable to attachment. The Court said: "Neither the safe nor the tin box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that against an officer acting under civil process. They were simply places of deposit and safe keeping for the defendant's property, which the sheriff may enter to make the seizure required by law, in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities or other articles requiring but little space for their custody, and then placing them in the hands of a safe deposit company for preservation, and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would form an expedient for the success of fraudulent devices, which might render the laws of the state for the collection of debts entirely powerless. No such effect could be given to a deposit of that nature without at once defeating the object plainly designed to be secured by the law in rendering the debtor's property liable to the process issued in favor of his creditors in actions brought to recover their just debts."

In *Chapin v. Lapham*, 20 Pick. 467, Shaw, C. J., lays down, what appears to us to be a reasonable rule and one of general application, that in its discretion the court may require a witness to examine memoranda or papers in his possession in order that he may qualify himself to give testimony material to the issue and essential in the determination of the matter before the court. The court said: "The

question then is, whether a witness who has the means of aiding his memory by a recurrence to *memoranda* or papers in his power, can lawfully be required to look at such papers, to enable him to ascertain a fact with more precision, to verify a date, or to give more exact testimony than he otherwise could, as to times, sums, numbers, quantities and the like. There may be cases undoubtedly, in which it would be a great hardship upon a witness to require him to qualify himself, so to speak. . . . But there are other cases, in which it would lead to an entire perversion and frustration of the purposes of justice, if a witness could not be required to refresh his memory, and prepare himself to testify, by an examination of papers in his own custody or power, or when they are produced at the trial."

In the case of a garnishee our statute requires that he shall disclose to the court what estate of the defendant he had in his hands or possession at the time of the service of the writ upon him as garnishee. If he has in his possession a sealed parcel or a locked safety deposit box belonging to the defendant and after service of the writ upon him as garnishee he has not informed himself as to the contents thereof, and if, in an examination before the court to determine his liability the garnishee is called as a witness, the court is not powerless to direct the witness to do what the court's officer, who has attached or levied upon a similar parcel or box, might do in making his inventory, and may direct the witness to qualify himself to give testimony which shall enable the court to determine the matter then before it. Chapter 301, Sec. 27, Gen. Laws, 1909, provides that all costs and charges which a person, copartnership or corporation shall incur as garnishee shall be paid by the plaintiff, thus reimbursing the garnishee for any expense to which he may be put in opening the parcel or box and examining the contents thereof. In *Trowbridge v. Spinning*, 23 Wash. 48, it was sought to attach the property of the defendant in the hands of a safety deposit company by process of garnishment. The garnishee in its answer disclosed that it had no property of the defendant in

its control unless such property was in a locked deposit box in its vault, which box it had rented to the defendant. The court considered the following provision of the Washington code: "Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession or under his control, or had when the writ was served, any personal property or effects of the defendant *liable to execution*, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects or so much of them as may be necessary to satisfy the plaintiff's claim. § 5404." The court said: "It is true that it was impossible for the garnishee to answer specifically as to the contents of the box. The court, however, under § 5404, *supra*, is authorized to determine from the answer or *otherwise* the effects under the control of the garnishee liable to execution. Under the broad provisions of this section, the court could inquire into the contents of the box by causing the defendant to be examined as a witness, and might even require an inspection of the contents, to the end that the effects liable to execution should be delivered to the sheriff."

In exercising its powers to investigate the private affairs of a defendant, which he has carefully guarded from the inspection of others, the court would naturally use great caution. It will take care that the process of garnishment may not be used as an instrument to needlessly expose the private papers, securities and valuables of a defendant in a case in which no judgment may be entered against him and in which the necessity of charging the garnishee may not arise. It should not be overlooked in this consideration that under the statute, Secs. 25 and 26, Chapter 300, Gen. Laws, 1909, a defendant may prevent such disclosure of his affairs by giving bond as therein provided. In the ordinary case, when there has been service of the writ upon the

(6) defendant and the jurisdiction of the court does not depend upon whether or not there be property of the defendant in the hands of the garnishee, the order upon a garnishee to open a sealed parcel or locked receptacle in his possession

belonging to the defendant may be delayed until after verdict or decision against the defendant. Then just before final judgment the court may well conclude that disclosure of the affairs of the defendant is necessary in order that his property may be applied to the payment of his debts, and the court may make the order referred to that it may be informed as to the facts upon which the liability of the garnishee is to be determined. The only requirement as to the time of this determination is that it shall be before or at the time of the entry of final judgment in the case. The court has authority to continue the case after verdict or decision and suspend the entry of final judgment that it may have sufficient time to determine the liability of a garnishee. *Stephanian v. District Court*, 29 R. I. 210. In case there has been no service of the writ upon the defendant, because he cannot be found within the state, and the jurisdiction of the court depends upon the attachment of property of the defendant in the possession of the garnishee the court will continue the case as prescribed in Sec. 1, Chapter 288, Gen. Laws, 1909. If at the expiration of this continuance the defendant has not come in and answered, and the garnishee has made affidavit that he has no property of the defendant in his possession except such as may be in a sealed or locked receptacle of the defendant in his hands, the contents of which receptacle are unknown to the garnishee, then the court upon motion of the plaintiff or the garnishee, for the double purpose of determining its own jurisdiction and the chargeability of the garnishee may inquire into the contents of said closed receptacle and if necessary may order the garnishee to open the same. This power is a reasonable exercise of the jurisdiction conferred upon the trial courts in the various provisions of Chap. 301, Gen. Laws, 1909, to which references have been made above. Regardless, therefore, of the statements of counsel before us we must assume the first question to be based upon the following circumstances; that the proper officer of the garnishee, either in his affidavit or in an examination before the court has dis-

(7)

closed to the court that the garnishee at the time of the service of process upon it had in its possession certain sealed packages belonging to the defendant, as to the contents of one at least, of which, the garnishee is informed and as to the contents of another it is ignorant; that as to the contents of the second package the court has made the investigation warranted by the statute and has found what the contents are; and that the contents of both the packages are of an attachable nature. The only question of law involved is whether property of a defendant, of a nature not ordinarily exempt from attachment by law, can be attached by process of garnishment, if said property is held by the garnishee in a sealed parcel. We have no hesitation in deciding that such an attachment may be made under our statute as of the defendant's personal estate in the hands of the garnishee. The fact that such property is contained in a sealed package does not place it in a different class from property in the hands of the garnishee which is in an unsealed package and does not exempt it from this form of attachment.

In support of its contention that it is not chargeable, in the circumstances set out in the first question certified, the garnishee has cited *Bottom v. Clarke*, 7 Cush. 487. In that case a bank was summoned as garnishee of the defendant. In its answer the garnishee disclosed that the only property of the defendant in its hands was contained in a small locked trunk, which the bank had permitted the defendant to place in its vault for safe keeping; that it had no knowledge of the contents of the trunk. Under a statute, similar to the former Rhode Island statute, the court held that the garnishee "must be charged or discharged on the answer which has been filed, and on that alone. That answer does not show that the trunk contained any attachable goods, effects or credits of the principal defendant." The court held that the garnishee should be discharged, not, as we understand from the opinion, because the trunk was locked, but because in the state of the Massachusetts law the court was unable to inform itself as to the contents of the trunk and

hence could not determine the liability of the garnishee. In the later case of *Adams v. Scott*, 104 Mass. 164, the court held that money of the defendant in the possession of an express company, delivered to it in a sealed package, was subject to garnishment. See, also, *Hooper v. Day*, 19 Me. 56; *Loyless v. Hodges*, 44 Ga. 647.

Each subdivision of the first question certified is answered in the affirmative.

The second question certified is propounded by the Superior Court only in the event that either subdivision of the first question is answered in the negative and therefore said second question is not considered by us.

- (8) The third question certified is: "*Third*: If the defendant in an action of assumpsit, by contract with a Safe Deposit Company has a right to the exclusive use of a safe deposit box owned by said Company, and said box (except by the use of physical violence which will injure the property of the company) can be opened only by the joint use of a master key retained in the possession of said Company and of one of two keys, both of which are in the possession of said defendant, and if at the time of the service upon said company of a writ of garnishment in said action the said safe deposit box contains property of the defendant which is not of a nature exempt by law from attachment, is the said Company chargeable as garnishee by reason of said facts (1) if any of the officers or employees of said Company were informed as to the contents of said box? (2) If none of the officers or employees of said Company was informed as to the contents of said box?"

This question fails to state where, by whom or under what conditions, said safe deposit boxes are kept, but we must consider, as was assumed in the argument of counsel that said boxes are kept in the vault of the safe deposit company, and in accordance with the well known course of business of such companies that the boxes themselves are subject to the general control of the garnishee, that access to them can only be obtained by the defendant at such times

and under such restrictions as the garnishee imposes and that at all times said boxes are subject to the protection and the care of the garnishee. It appears from the terms of the question that the court has been able to determine what are the contents of the boxes; and that as to all the boxes involved the contents are of an attachable nature. The only essential difference between this question and the first question, already considered, is that in the first question the sealed parcels are stated to be in the possession of the garnishee and in this question it is not stated that the boxes are in the possession of the garnishee. If these boxes are in the vault of the garnishee under the conditions as we have assumed them to be, we find no difficulty in deciding that the boxes themselves, whatever may be determined as to the contents thereof, are in the hands and possession of the garnishee in the sense in which these words are used in our statute. The garnishee or trustee has the exclusive actual physical custody and control of these boxes against all persons other than the defendant and its control is only subject to the right of the defendant to open the boxes in accordance with the regulations of the safe deposit company, to examine his property, to remove it therefrom or to place his property therein.

If these boxes are in the possession of the garnishee, as we find them to be, then the condition of the contents thereof, with regard to their possession by the garnishee, does not differ from that of the contents of the sealed parcels considered in the first question. In the case of the parcel the owner sought to guard its contents from examination by others by sealing the parcel. The intent of the owner, in that respect, could be frustrated only by the use of force in removing the seal or in some other manner opening the parcel. After the contents of the safe deposit boxes had been protected in the manner set out in the question the owner's purpose might be defeated by the use of the same kind of agencies as those required to open the sealed parcel, only by a greater degree of force. In the case of these boxes

a slightly complicated method has been adopted for securing their contents against access; but the method is immaterial. The position of the contents, in regard to the question we are now considering, does not differ from that of the contents of a box or trunk locked and placed by its owner for safe keeping in the vault of the garnishee, which box or trunk might be opened directly by the use of one key, retained by the owner of the box. If the receptacle is in the hands or possession of the garnishee, as those words are used in our statute, then the contents of such receptacle, though the owner has attempted to bar access to them, are also in the garnishee's hands or possession and they are subject to attachment in its hands by garnishee process. It was so held as to a sealed parcel, *Adams v. Scott*, 104 Mass. 164 *supra*; as to locked trunks and nailed boxes, *Hooper v. Day*, 19 Me. 56, *supra*; as to a box nailed up, *Loyless v. Hodges*, 44 Ga. 647, *supra*.

The cases are not numerous, which decide as to who has possession of the contents of a safe deposit box or safe, rented by a safe deposit company to its customer, and held and guarded by it in its vault, when the box or safe is locked by the owner of said contents. In the somewhat early case of *Gregg v. Hilson*, 8 Phila. 91, decided in 1871, Sharwood, J., sitting alone in a motion court, in hearing upon a motion for a rule held: that the contents of a safe rented by a safe deposit company to a customer and locked by him, "are in the actual possession of the renter of the safe," and are not subject to attachment by garnishee process. Upon the authority of this ruling and the opinion in *Bottom v. Clarke*, 7 Cush. 487, *supra*, a number of textwriters have enunciated the principle that property so situated in a safe deposit box cannot be reached by garnishment proceedings. In later cases, however, a number of courts, in carefully considered opinions, have approved what appears to us to be the sounder doctrine as to the relations existing between safe deposit companies and their customers, and as to the posi-

tion of these companies with reference to property placed by customers in the safe deposit boxes.

In considering the question of possession, though not with reference to garnishment, the court said in *Lockwood v. Manhattan Co.*, 50 N. Y. Supp. 974: "It is urged upon the part of the defendant that it was not the bailee because it was not in possession of the plaintiff's property. If it was not it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property without the consent and active participation of the defendant. She could not go into her safe unless the defendant used its own key first, and then allowed her to open the box with her own key; thus absolutely controlling the access of the plaintiff to that which she had deposited within the safe. The vault was the defendant's and was in its custody, and its contents were under the same conditions. As well might it be said that a warehouseman was not in the possession of silks in boxes deposited with him as warehouseman, because the boxes were nailed up and he had no access to them."

In *National Safe Deposit Co. v. Stead*, 250 Ill. 584, the court said: "We think it clear that where a safety deposit company leases a safety deposit box or safe, and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables, and that the fact that the safety deposit company does not know, and that it is not expected it shall know, the character or description of the property which is deposited in such safety deposit box or safe does not change that relation, any more than the relation of a bailee who should receive for safe-keeping a trunk from a bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor, although the obligation resting upon the bailee with reference to the care he should bestow upon the property in the trunk might depend upon his knowledge of the contents of the trunk.

Obviously the bailee would be in possession of the trunk and its contents, and no amount of argument would demonstrate that, while the trunk was in possession of the bailee, its contents were in the possession of the bailor, solely by reason of the fact that the bailor of the trunk retained the key, and the bailee did not have access to the trunk. We are of the opinion that the relation of bailee and bailor exists between the appellant and its lessees, and that the deposit of the securities and valuables by its lessees in rented safety deposit boxes or safes is a bailment, and that the law applicable to bailments generally applies to such transaction and to such property."

In *Trowbridge v. Spinning*, 23 Wash. 48, the following facts were stated in the opinion of the court: "The garnishee defendant, the National Bank of Commerce, answered, stating that the respondent had in its vaults a safe deposit box, to which there was a private and a master's key, the private key being in the possession of the respondent and the master's key in the possession of the garnishee defendant; and to open said box it is necessary, first, for the master's key to be used; second, for the private key to be used; that the contents of the box were unknown to the garnishee defendant. To the vault there was a vault door, locked by a time combination, which was under the exclusive charge of the garnishee defendant." The lower court discharged the garnishee. The Supreme Court said: "From the conclusions of law, the findings of fact, the evidence, and the brief of the garnishee, it is evident that the only question considered by the court below and passed upon, was whether the garnishee had control of the effects in the box. If we are correct in this, we are of the opinion that the court erred in holding that the garnishee did not have control of the contents of the box. At any time on the request of the defendant the garnishee could put it within the power of the defendant to remove the contents of the box, and the defendant could not remove the contents without the consent and active co-operation of the garnishee. As against the

defendant, then, the garnishee had control of the contents of the box." The Supreme Court held that the lower court erred in discharging the garnishee.

In *Washington, etc. Co. v. Susquehanna Coal Co.*, 26 App. Cas. D. C., 149, the court said: "Property of a defendant in a safe-deposit box of a trust company is either in the possession of the defendant, or in the possession of the trust company. If it is in the possession of the defendant, under the Code, it appears liable to attachment and execution. If it is in the possession of the trust company, such company may be garnished therefor, as in possession of personal property of the defendant capable of being seized and sold on execution. A mere device to guard from intrusion the defendant's property in the vault of the trust company neither divests the defendant of his property, nor releases the company from its charge of defendant's property. There is no magic in two keys, a master key and a customer's key, to put property belonging to a defendant in an attachment beyond the reach of creditors and the process of the courts.

"If there were a doubt respecting the term 'possession' there can be no doubt that property deposited by a defendant in a safe-deposit box of a trust company is the defendant's property in the hands of, and in charge of, the trust company; and, by the terms of the Code, the trust company is liable to be garnished therefor."

Each subdivision of the third question certified is answered in the affirmative.

The fourth question certified is propounded by the Superior Court only in the event that either subdivision of the third question is answered in the negative and therefore the fourth question is not considered by us.

The papers in this cause are sent back to the Superior Court with our decision certified thereon.

Green, Hinckley & Allen, for plaintiff.

Frederick W. Tillinghast, Rush Sturges, of counsel.

C. M. Van Slyck, Frederick A. Jones, for garnishee.

THE FIRST BAPTIST SOCIETY vs. JOHN H. WETHERELL.

APRIL 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Deeds. Construction. Easements.*

Plaintiff having constructed its building so that its foundation encroached upon the land of ancestor of defendant, about two feet, with the eaves extending over a further distance of about two feet, defendant's ancestor by deed quitclaimed his interest in the land appropriated with the "privilege for the roof of said meeting house to drip on my land forever."

At this time the building had been completed.

Held, that the intent of the grant was to permit the drip from plaintiff's building as it then stood, to fall upon defendant's land.

(2) *Same.*

The extent of the rights acquired under a grant, must depend upon the construction placed upon its terms, and in the construction of such instrument, the court will look to the circumstances attending the transaction, the situation of the parties and the state of the thing granted, to ascertain the intention of the parties, and in case of doubt, the grant must be taken most strongly against the grantor.

(5) *Deeds. Easements. Right of Drip.*

An express grant of a particular right carries with it by implication the additional right of doing whatever is reasonably necessary for the enjoyment of the right, and where one has acquired the right for his roof as it then existed to drip on the land of another, he has the right to maintain the roof from which the drip flows, and this easement is not nullified so as to permit the servient estate to remove all overhanging objects, by the fact that in an action for trespass and ejectment between the owners of the dominant and servient estates, in which the question of the easement was not raised, the title of the owner of the servient estate in the strip of land over which the roof projected, was confirmed.

TRESPASS ON THE CASE. Heard on exceptions of defendant, and overruled.

VINCENT, J. This is an action of trespass on the case to recover damages for interference with an easement.

The case was tried before a jury, in the Superior Court, and a verdict rendered for the plaintiff for \$200. It now comes to this court upon various exceptions of the defendant

to the rulings and charge of the trial judge, and his refusal to grant a new trial.

The plaintiff and defendant own adjoining estates in Newport. The defendant's title is derived from Sandford Bell, who, in 1846, owned the land immediately north of that on which stands the church edifice of the plaintiff. The plaintiff society so located and constructed its building, presumably through inadvertence, that its foundation encroached upon the land of Bell, a distance of two feet, the eaves extending over a further distance of about two feet and eight inches. On May 12, 1846, Bell, who by the way was a member of the plaintiff society, conveyed thereto, by a quitclaim deed, all his right, title and interest in and to, the strip of land which had been appropriated and built upon by the church. Bell also included, in this deed, the grant of an easement or "right of drip" to the plaintiff society upon his remaining land.

- (1) The Bell deed contained the following descriptive language and habendum: "A certain strip of land about two feet in width, running easterly and westerly along and under the northerly side of the meeting house of said society, which said meeting house lately built by said society, stands as aforesaid about two feet on the land of the grantor. It being the intention of the grantor to release to said society all of his said land adjoining the northerly side of the land of said society in said town of Newport, on which the northerly side of said meeting house stands; with the privilege for the roof of said meeting house to drip on my land forever."

"To Have and to Hold the same with the said privilege of the drippings to the said First Baptist Society of Newport and their assigns forever."

Whatever may have been the legal effect of this conveyance and grant, it nevertheless becomes apparent therefrom, as well as from the relations of the parties, that it was the intention of Bell to save the plaintiff society from any consequences which might arise from its unintentional encroach-

ments upon his property and rights, and to place it in a position where it might, in the future, rightfully maintain the structure which it had already erected.

The plaintiff society remained in the uninterrupted enjoyment of the rights, sought to be conveyed and granted by Bell as aforesaid, down to the latter part of the year 1905, when the defendant, in providing for certain changes in his own building, adjoining the plaintiff's premises, removed a portion of the jet on the north side of the church, reducing the width thereof, for a distance of about twelve feet, from two feet and eight inches to about two inches. Having cut away the jet, the defendant supplied some gutters and pipes designed to carry off the flow of water from this section of the roof, or convey it to other gutters and pipes already attached to the plaintiff's building. As a result, however, water ran over the gutters, came down on the north side of the church and on to the ground, worked its way into the church foundations and into the cellar, doing some damage and necessitating some expenditure for repairs.

At the time of the grant from Bell, May 12, 1846, the church edifice had already been fully completed. It remained without exterior change down to 1905 when the defendant cut away the eaves to accommodate the upward projection of his own building. Bearing in mind these facts and considering the particular language of the grant it becomes evident that Bell intended to, and did, provide that the drip from the plaintiff's building, as it then stood, should fall upon his land.

The language of the grant "with the privilege for the roof of said meeting house to drip on my land" is significant. The words "said meeting house" in view of all the circumstances surrounding the transaction must, we think, be construed as referring to the building as it then existed.

- (2) The extent of the rights acquired must depend upon the construction placed upon the terms of the grant and in construing such instruments the court will look to the circumstances attending the transaction, the situation of the parties, and the state of the thing granted, to ascertain the intention of

the parties, and in case of doubt the grant must be taken most strongly against the grantor. 14 Cyc. 1201.

The plaintiff having acquired an easement in the land of the defendant it became entitled to the full and proper enjoyment thereof without interference from the owner of the servient estate, Jones on Easements, Section 170, page 147; *Keats v. Hugo*, 115 Mass. 204, 216, and upon any interference therewith the owner of the dominant estate might proceed by way of injunction or suit at law for damages, as in the present case.

At the same time that the plaintiff society commenced the present action against the defendant it also brought an action against him, in trespass and ejectment, for the recovery of four parcels of land, one of such parcels being an oblong strip running along the northerly side of the church building beneath that part of the roof which the defendant had cut off. In this last named suit, judgment was rendered for the defendant—see 72 Atl. 641. The defendant now cites this case, claiming that the questions raised in the present suit are *res adjudicata*.

- (3) The defendant contends that because of this judgment his title, to the strip of land in question, has been confirmed and that he now has the right to build thereon in any manner which he chooses, cutting off everything which obstructs his way. In other words, that the judgment in the former suit operates as a nullification of the easement granted by the Bell deed and that the "right of drip" of the plaintiff society has become effaced thereby.

With this contention we cannot agree. An examination of that case shows that it was brought for the purpose of ejecting the defendant, the plaintiff claiming that the strip of land, two feet wide, mentioned in the Bell deed, was not the strip covered by the foundation of the plaintiff's building, but was a strip upon the north side and beyond the line of the church structure. The plaintiff therefore relied upon a record title in fee to this outside strip of land and the question of the plaintiff's easement was neither raised nor considered in that suit.

The defendant cites a number of authorities in support of the principle expressed in that old maxim "*Cujus est solum, ejus est usque ad coelum*," and that the owner of the land may therefore remove all overhanging objects, as for instance the limbs of trees, etc., and claims that the right is equally clear in the matter of overhanging roofs. Such general right cannot be disputed. However, the questions presented here are somewhat different. They are: (1) Did the plaintiff acquire an easement in the land of the defendant through the grant contained in the Bell deed of May 12, 1846, and (2) if the plaintiff did acquire such an easement, is it still entitled to the enjoyment thereof notwithstanding the judgment in the ejectment suit before referred to?

The fee to this strip of land, along the north side of the church building, is and always has been in the defendant and his predecessors in title, but it is subject to the easement created in the deed from Bell of May 12, 1846.

An express grant of a particular right carries with it by implication the additional right, sometimes called a secondary easement, of doing whatever is reasonably necessary for the enjoyment of the right granted,—14 Cyc. 1203 and cases cited,—and therefore the plaintiff having acquired the right for its roof, as it then existed, to drip on the land of Bell it naturally follows that it has the right to maintain the roof from which the drip flows.

The defendant has taken a number of exceptions to the rulings of the court on the admission and rejection of testimony; to certain portions of the charge; to the refusal to charge as requested, and to the decision of the trial judge denying the defendant's motion for a new trial, etc.

None of these exceptions, in view of the conclusions which this court has already reached, can be sustained and they are accordingly overruled.

The case is remitted to the Superior Court for the County of Newport, with direction to enter judgment on the verdict.

Sheffield, Levy & Harvey, for plaintiff.

Frank F. Nolan, Comstock & Canning, Patrick P. Curran, for defendant.

COURTLAND P. CHAPMAN vs. JAMES M. PENDLETON, Town
Treasurer.

APRIL 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence. Highways. Requests to Charge.*

In an action of trespass q. c. against a town in taking land for highway purposes, the evidence showed an understanding with plaintiff that the town was to reset the walls, and that the town used about one-third of the stones from the walls in a stone crusher and that material to build a good wall was not to be found in that locality.

Held, that under such facts, request to charge that if plaintiff was present and knew of the taking down of the walls and the construction of the road by the town and made no objection, the town had the right to believe that he was consenting thereto and he could not recover therefor in an action of trespass, was inappropriate, since there was no evidence that plaintiff acquiesced in the use of his walls in that manner.

(2) *Highways. Towns. Agency.*

In an action of trespass arising out of the taking of land for highway purposes, request to charge that if plaintiff permitted the work to proceed under a promise that the town would make him whole for it, he could not recover in an action of trespass, but was confined to an action on the promise, was properly refused, since one dealing with a town or its agents is presumed to know the law relative to the scope of such agency and the powers of the town with reference to the marking out of highways, which are strictly defined by Gen. Laws, 1896, cap. 71, and nowhere include the power to enter into such an agreement.

(3) *Verdicts. Special Findings.*

In an action of trespass arising out of the taking of land for highway purposes, a general verdict of guilty is not inconsistent with a special finding that the construction of the highway was made with the consent of plaintiff, where such consent referred to an understanding between plaintiff and the town which was not carried out by the latter, and not to a consent to the construction after it was completed.

(4) *Highways. Trespass.*

Where proceedings under which a highway was attempted to be laid out, have been quashed for irregularities, no authority can be claimed thereunder.

(5) *Trespass. License. Burden of Proof.*

When a conditional license is relied upon in defence to an action of trespass, the burden of proving the license and performance of its conditions is upon the one alleging the same.

(6) *Trespass. License. Motive.*

To enter upon land with the intention to act in such a manner as to put it

out of ones power to comply with a condition of the license granted, would constitute a trespass, and in the absence of any explanation, the jury may infer a motive from the conduct of the persons concerned.

TRESPASS QUARE CLAUSUM FREGIT. Heard on exceptions of defendant, and overruled.

DUBOIS, C. J. This is an action of trespass *quare clausum fregit*, brought by the plaintiff against the town treasurer of Westerly, to recover damages for the acts of its agents and servants in entering upon three separate parcels of his land, nearly one mile in length, and varying in width, adjoining the Watch Hill Road, and removing therefrom about 5,370 lineal feet of boundary wall, and widening, relaying and reconstructing said road by building the same upon and over the surface of the greater portion of said strip of land. The plaintiff is a farmer and owns a great deal of land along said highway. In March, 1907, the town council of Westerly voted that it was necessary to relay and widen about four miles of said road, and appointed a committee for that purpose. The committee was engaged to perform their duties October 17, 1907, and made their report to the town council October 28, 1907; this report was duly accepted and confirmed by the town council, and an appeal from their decree was taken by the plaintiff herein; the appeal was heard in the Superior Court upon the appellant's motion to quash said proceedings and a final decree quashing the same was entered in the Superior Court, November 30, 1908. Immediately after the appointment of the above-mentioned committee and before their engagement as such the town council advertised for bids to do the work proposed and entered into a contract therefor with the T. H. Gill Company, March 28, 1907. The Gill Company commenced work under its contract in April, 1907, and completed the same to the acceptance of the town council, November 4, 1907, nearly four weeks before the final decree quashing the proceedings was entered in the Superior Court. On the seventeenth day of November, 1908, the town council ap-

pointed another committee to relay and widen said road, who were duly engaged and made report to the town council, who accepted their report on May 3, 1909, and the plaintiff claimed an appeal from their decree confirming the report and from the assessment of damages made by the town council. On November 27, 1908, the plaintiff presented a particular account of his claim against the town and the same not having been satisfied within forty days after its presentation, he commenced suit, by writ dated June 3, 1909, which is the case under consideration.

The appeal from the decree of the town council confirming the report of the committee appointed November 17, 1908, and the present case, pending at the same time were consolidated by the court, against the objection of the plaintiff, upon the following:

“MOTION TO CONSOLIDATE.

“And now come the defendants in the above entitled causes, and move that the same may be consolidated for the purposes of trial, showing:

“1. That the plaintiff in each of said causes is Courtland P. Chapman.

“2. That the actual party in interest as defendant in both of said causes is the Town of Westerly.

“3. That each of said causes are brought for the recovery of damages growing out of the same transaction, viz.: the taking of certain land of the plaintiff for highway purposes by said Town of Westerly, the first of said actions referring to damages connected with the actual construction of the highway under a defective condemnation, and the second of said actions referring to the damages occurring from the condemnation of the land under subsequent proceedings.

“4. That the matters connected with the question of damages in said two causes are so inextricably confused that the same cannot be separated without great difficulty, and that grave injustice is liable to be done to one or the other of the parties by the trial of said causes separately.

"5. That the witnesses and testimony in the two cases must largely be identical, and that great and unnecessary expense to the parties will be occasioned by the trial of said causes separately.

"6. That the consolidation of said suits will expedite the business of this court, and prevent unnecessary cost and a multiplicity of suits, and that the matter in dispute can more conveniently and satisfactorily be determined in one action than in two."

The declaration in the case under consideration contains three counts, to which the defendant filed a plea of the general issue, and subsequently, in the course of the trial, it was permitted to file special pleas of "leave and license of the said plaintiff to it for that purpose first given and granted," and "leave and assent of the said plaintiff to it for that purpose first given and granted, to wit, at the said several times when &c. in accordance with a prior understanding and agreement as to the relocation of the highway along said premises theretofore, to wit, at said Westerly, to wit, on the 22nd day of January, A. D. 1907, entered into between the plaintiff and the agents and servants of the said town of Westerly, to wit, Tristram D. Babcock, President of the town council of said Westerly, and Thomas McKenzie, the engineer of said town." To these pleas the plaintiff filed his replication traversing the same.

Under the consolidation aforesaid the cases were tried together with the result that in the case of the plaintiff's appeal from the decree of the town council, a verdict was rendered sustaining the layout of the highway, but increasing the damages. It appears that neither party has made any attempt to disturb these findings and that the amount of the verdict has been paid to the plaintiff by the town. In the case at bar the jury returned a general verdict against the defendant and assessed damages for the plaintiff in the sum of \$600, and also returned the following special verdicts: "The reconstruction of the highway along the premises in question in these suits, and over portions thereof, by the

town of Westerly in the year 1907, was made by said town with the consent of the plaintiff;" and "The work of reconstructing the highway along the premises in question in these suits, and over portions thereof, by the town of Westerly, in the year 1907, was not done by said town, with the knowledge of the plaintiff, and without objection on his part to the doing of said work until after said work of reconstruction had been completed."

The defendant thereupon filed the following motion for a new trial: "And now comes the defendant in the above entitled cause, and moves that a new trial be granted him for the following reasons:

"1. That the general verdict in said cause is contrary to the evidence.

"2. That the general verdict in said cause is contrary to the weight of the evidence therein.

"3. That the general verdict in said cause is contrary to law.

"4. That the general verdict in said cause is inconsistent with the first special finding made by the jury therein.

"5. That the damages assessed by the jury in said cause are excessive.

"6. That the second special finding of the jury, is contrary to the evidence in said cause;" which was denied by the justice who presided at the trial of the cause, as appears by the following rescript:

"This is an action for trespass for damages to plaintiff's realty, caused by the servants and agents of the town of Westerly, in the construction of a highway, etc., along the land of the plaintiff, acting under a defective condemnation.

"Before the trial of this case, a motion of the defendant, which was opposed by the plaintiff, to consolidate a second action for damages for a subsequent condemnation of this land, in subsequent proceedings, was granted by the court, and the two actions were tried together by one jury.

"The jury awarded damages of six hundred dollars in this particular action, and the defendant objects to the award

on several grounds, the principal one argued on the motion for the new trial being that the damages were excessive.

"The defendant, in the motion to consolidate, made the following allegation, as a reason for the consolidation of the two actions:

" 'That the matters connected with the question of damages are so inextricably confused that the same cannot be separated without great difficulty, and that grave injustice is liable to be done to one or the other of the parties by the trial of said causes separately.'

"After hearing the evidence at the trial the Court was satisfied that the above statement by the defendant was a correct statement:

"The defendant, having asked a trial by one jury of both causes of action, and having placed on record the admission that the damages are so inextricably confused that the same cannot be separated without great difficulty, cannot fairly complain, if the trial court, in passing upon the amount of damages in this case, takes into consideration the award of the jury in the second case, from which no appeal was taken.

"Viewed as a whole, the findings of the jury, meet with the approval of the trial Court. The questions of law and fact in these cases were somewhat complicated, and in my opinion the findings of the jury, which was composed of men familiar with the locality and the local conditions, effect substantial justice.

"It is true that an award of a sum somewhat less than \$600 might have been warranted if the jury had taken the defendant's view of the testimony, but the Court does not consider that the jury has exceeded its jurisdiction in the amount of the award of damages, and consequently the motion of the defendant for a new trial is denied."

Whereupon the defendant duly excepted to the ruling of said court and filed and prosecuted its bill of exceptions and the case is before this court for consideration upon the following questions now relied on by the defendant:

1. Did the court err in refusing to grant the requests to charge the jury, offered by the defendant, and numbered "17," "19" and "20," respectively?

2. Did the court err in refusing to rule that the general verdict in said cause was inconsistent with the first special finding?

3. Did the court err in refusing to grant a new trial on the ground that the general verdict was contrary to the evidence and the weight thereof in that the town of Westerly was not guilty of trespass?

4. Did the court err in refusing to grant a new trial on the ground that the damages awarded in said verdict were excessive?

The requests above alluded to respectively read as follows:

- (1) 17th request: "That if the plaintiff was present and knew of the taking down and removal of the walls from their old location, and the construction of the road by the town, and made no objection thereto, it had a right to believe that he was consenting to such removal of the walls and construction of the road, and he cannot recover therefor in an action of trespass."

19th request: "That if the plaintiff permitted the work to proceed under a promise that the town would make him whole for it, he cannot recover in an action of trespass for the work so proceeded with, but is relegated to an action on the promise relied upon by him in permitting the work to so proceed."

20th request: "So also, if the plaintiff permitted the work to proceed in consequence of a promise in behalf of the town that 15% of the amount coming to the contractor should be retained until the contractor had made right the matter of construction of walls, retaining walls, &c., complained of, the plaintiff cannot recover in trespass for the work so proceeded with, but is relegated to an action on the promise so made in behalf of the town."

These requests are founded upon the defendant's special pleas hereinbefore referred to. Tristram D. Babcock, who

was president of the town council of Westerly from June 1906 to June 1907, testified as to the terms and conditions imposed by the plaintiff with respect to the taking of his land for the highway: "Q. 60. What were his terms and conditions? Ans. His terms were for the pasture part to the north of where I live, \$25. Q. 61. At the north, you mean this way? Ans. Yes; to the south it was \$250, with the understanding that the town was to reset the walls and remove the soil in convenient heaps for him to take away. Q. 62. Now, was there anything further said, if so what, by Mr. Chapman and the committee and any other persons of the town, concerning the walls? Ans. Yes; he said that he wanted a good wall and I made objection to that from the fact that material was not there to build a good wall. I told him the walls would be reset, or rebuilt, and he desired a wall like mine. He referred to some wall I had lately had built. . . . Q. 65. What was said about that? Ans. I told him that was simply an impossibility and we would not build such a wall as that and the matter was all finally left that the walls should be reset." It also appeared in evidence that about one-third of the stones were taken from the walls and broken up in a stone crusher for use in the highway. It thus appears that the walls could not be reset or rebuilt with the materials of which they were composed, because one-third of that material had been taken away and converted to another use, and it also appears that material to build a good wall was not to be found in that immediate locality. In these circumstances the seventeenth request was inappropriate. There is a vast difference between taking down walls for the purpose of rebuilding or resetting them on a new line, in exercise of a license given for that purpose, and taking them down to crush a portion thereof for road purposes, with the hope of rebuilding them out of the material then remaining. There is no evidence that the plaintiff permitted or acquiesced in any such use of his walls.

- (2) The nineteenth request was also properly refused. Every person dealing with a town or with the agents of a town is

presumed to know the law relative to the scope of such agency and the powers of the municipality with reference to the matter under consideration. The powers of a town, its town council and the men appointed by them to mark out highways, are strictly defined in Gen. Laws, R. I., 1896, cap. 71, "Of laying out and making highways and driftways," and nowhere includes the power to promise that the town will make whole the owners of land over which a highway is laid out, for the damage they shall sustain, if any, by means of such highway passing through their land. Sec. 4 of said chapter provides as follows: "They (the men appointed) shall also agree with the owners of the land over which such way is laid out, for the damage they shall sustain, if any, by means of such highway passing through their land; and in case they cannot agree with the owners, the town council shall value and appraise the damage, if any, caused by such highway passing through their land." And Sec. 11 of said chapter as amended by C. P. A., Sec. 1102 reads as follows: "Sec. 11. If any person through whose land a highway or driftway is laid shall be aggrieved by the doings of the committee or town council, he, his heir or devisee, may appeal to the Superior Court in accordance with the provisions of law with reference to appeals from town councils." No such promise as is contained in the request, if made, would be binding on the town, or would furnish any basis for an action against the town. For the same reasons the twentieth request was properly refused. The questions at issue were clearly set forth by the presiding justice at the trial in his charge to the jury, and to have granted the requests would have only tended to confuse the matter by directing the attention of the jury to immaterial matters. We see no inconsistency between the general verdict and the first special finding. The general verdict is that the defendant is

(3) guilty of trespass; the first special finding is that "the reconstruction of the highway along the premises in question in these suits, and over portions thereof, by the town of Westerly in the year 1907, was made by said town with the con-

sent of the plaintiff." By this we understand that the town, through Mr. Babcock, and the plaintiff made the agreement that Mr. Babcock testified to, that the town should pay the plaintiff \$275 and take the component parts of his walls from the old to the new line and reset them there, and upon that understanding the plaintiff consented to the reconstruction of the road in the manner proposed. We do not understand by the special finding that the plaintiff consented to the reconstruction after it was completed. Apparently such was not the intention of the finding because it carefully omits all mention of work done. We will not assume that counsel attempted to confuse or mislead the court or the jury by the special findings, and if the first special finding was intended to relate to a time after the completion of the work, the second special finding was not only unnecessary but misleading. In our opinion the Superior Court judge did not err in refusing to grant a new trial upon the ground that the general verdict was contrary to the evidence and the weight thereof in that the town of Westerly was not guilty of trespass. If the agents of the town entered upon the lands of the plaintiff without authority, they and the town, which is responsible for their acts done within the scope of their authority, are guilty of trespass. It is manifest that as the proceedings, under which the highway was attempted to be laid out, were quashed in the Superior Court no authority is or can be claimed thereunder. The only other authority, and the one specifically relied upon by the defendant, is the leave, license or consent of the plaintiff. But that was conditional as hereinbefore shown. When a conditional license is relied upon in defence to an action of trespass, the burden

(4) of proving the license and the performance of its conditions

(5) is upon the party alleging the same. Whether or not the defendant successfully maintained the burden was a question for the jury. By their verdict the jury decided that it did not. With what intention the agents of the defendant took down the plaintiff's walls, whether for the purpose of removing and resetting the same on the new line, or for the

purpose of crushing some of the stones therein, was a question difficult to determine, and even more so was the question whether the agents of the town may not have innocently taken down the walls, to remove and reset in accordance with the license granted, and afterwards have succumbed to the temptation to use portions thereof in the crusher which was conveniently situated in close proximity to the same. In the absence of any explanation, offered by the (6) persons concerned, the jury had the right to infer their motive from their conduct, to judge them by their acts in the premises. It was proved that they did destroy a portion of the walls, thus making it impossible to rebuild or reset the same with the original materials. To enter upon the land with the intention to act in such a manner as to put it out of their power to comply with a condition of the license granted them, would clearly constitute a trespass.

There was sufficient evidence to justify the verdict that the defendant is guilty of trespass. We cannot say that the court erred in refusing to grant a new trial upon the ground that the damages awarded were excessive. It was clearly a matter for the jury to determine upon the testimony. The verdict of the jury has been approved by the judge who saw and heard the witnesses and we cannot say that the verdict was the result of passion, prejudice or other improper motive or that the judge erred in his approval of the verdict. The case in this respect comes within the doctrine approved in the case of *Wilcox v. The Rhode Island Company*, 29 R. I. 292.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court within and for the county of Washington, with direction to enter judgment on the verdict.

John W. Sweeney, for plaintiff.

Walter H. Barney, Everett A. Kingsley, for defendant.

WALTER R. E. BEEBE vs. WARREN M. GREENE, Town Treasurer.

APRIL 9, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) Contracts. Evidence. Damages.

In an action for negligence, causing personal injury, testimony of plaintiff that he bought wood, which he could have sold at a profit, but on account of the injury, sold it at a loss, is not open to the objection that it is in proof of a lost contract, not alleged in the declaration, and is admissible.

(2) Contracts. Evidence. Damages.

In an action for negligence, causing personal injury, plaintiff was properly permitted to testify that he was deprived of the opportunity in his occupation as a teamster, of carrying between two towns merchandise for which there was a market in each town, such testimony not being open to the objection that it was speculative.

(3) Evidence. Notice. Documents.

Rule 19 of rules of practice of the superior court provides that no paper which is not set forth or substantially stated in the pleadings, shall be used as evidence unless notice shall be given the opposite party at least 3 days before the trial.

Held, that, where a declaration in a personal injury case averred that plaintiff within 60 days after the accident presented to the town council a particular account in writing of his claim and how and when and where the same was incurred and that satisfaction had not been made within 40 days after the presentation of said claim, the record of the town council relative to such claim, was that of a paper substantially stated in the pleadings and was properly admitted when testified to by the town clerk.

(4) Highways. Defects. Notice.

Gen. Laws, cap. 46, § 16, provides that a person injured shall within 60 days give to the town notice of the time, place and cause of such injury, and if the town shall not make just satisfaction therefor, within the time prescribed, he shall commence his action within one year after the date of such injury.

Held, that a paper wherein plaintiff presented his "claim" against the town, for injuries alleged to have been received on a highway, through a defect therein, which set out facts as to the time, place and cause of such injury, was a sufficient compliance with the provisions of the statute requiring "notice."

(5) Highways. Notice. Time.

Where an accident on a highway occurred January 13th, notice served on the town council March 14th was served within 60 days after the accident, within the provisions of Gen. Laws, 1909, cap. 32, § 12, providing that

whenever time is to be reckoned from any day, such day shall not be included in such computation.

(6) *Trial. New Trial. Evidence. Witnesses.*

Where in an action for personal injury, the court inquired of a physician, a witness for defendant, if he knew certain physicians, who the court stated had testified before him in another case, and asked "would you be surprised that they said it was extremely rare, they had only known two or three cases," the conduct of the court did not constitute prejudicial error where he properly instructed the jury that he was not a witness and that they were not to attach any importance to his remarks as testimony.

(7) *Witnesses. Trial.*

The trial court may properly inquire of any witness expert or ordinary as to his meaning in the use of terms employed by him.

(8) *Highways. Notice. Variance.*

In a personal injury case, the notice and declaration placed the defect at about 60 feet east of a gateway leading into a cemetery. Plaintiff testified that it was twenty paces "from the east gate post leading into the cemetery to the bar way down hill to the left." A witness for defendant testified that the distance was 62 feet; another witness for defendant stated 67.10 feet; other witnesses for plaintiff about 60 feet.

Held, no variance, the notice giving the information with substantial certainty.

(9) *New Trial. Direction of Verdict.*

A ground for a motion to direct a verdict that "the hole was impossible to have been there" is too general to be considered.

(10) *Credibility of Witnesses.*

It is for the jury and not for the court to pass upon the credit to be given to the witnesses, and the weight of their testimony, and the court should hesitate either in removing a case from or requiring a verdict by a jury, on the ground that something, the subject of human testimony, was absolutely impossible

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant, and overruled.

DUBOIS, C. J. This is an action of trespass on the case for negligence brought in the Superior Court by the plaintiff, against the town treasurer of the town of Coventry, to recover damages for injuries sustained by the plaintiff through a defect in the Washington and Bowen's Hill Road, a public highway in said town. The defect complained of is said to have consisted of a "hole, gully or washout," running

down a hill in said road for a distance of about sixty feet from the gateway leading from the road into Bowen's cemetery, and to have been located between the ruts, in the path where horses travel, and to have been caused by allowing water to run down and wash the hill in the middle of the road, instead of in the gutters at the sides thereof. There was testimony that the defect had existed for a period of from six months to a year prior to the accident wherein the plaintiff was injured. The plaintiff's claim is that on December 25, 1909, the defect was filled, covered and concealed by snow, and that the same had drifted into the road at this point; that, by authority of the town, a road was shovelled around the edge of the snow-drift in such a manner that the ruts made in using this temporary way were about three feet to the south of the ruts existing in the road under the snow, so that the new north rut was brought over the place of the defect so covered and filled with snow; that the worked or wrought portion of the road at this point was about sixteen feet wide; that the ruts therein were about six feet apart, and that the north rut was distant about one foot from the north side of the road as wrought, and the south rut was distant about nine feet from the south side thereof; that the snow ruts were therefore respectively four and six feet away from the sides of the wrought road; that on account of the severity of the cold weather that existed from the time of the snow-storm aforesaid until the thirteenth day of January, 1910, the snow in the hole or gully packed down and was frozen hard, so that teams, carts and carriages passed over the same safely; that the plaintiff drove over the same safely about January first, 1910, when on account of the snow no hole was visible; that, prior to this time, the plaintiff had not been over the road in years and was wholly ignorant of the existence of the defect; that early in the morning of January 13, 1910, the plaintiff drove over the road in an empty two-horse wagon, at which time the snow remained in the condition above referred to, but that during the day the weather moderated, it grew warm and the snow softened up and melted consider-

ably; that about two o'clock in the afternoon the plaintiff returned over the road with nearly a ton of hay on his wagon, he and his hired man riding on the load, which was about ten feet from the ground, and that when they arrived at the gateway aforesaid, where the road had been shovelled around the snowdrift he drove in the snow ruts above described until he came to a point about sixty feet below said gateway, when his rear left wheel sank through the snow into said gully, a distance of "about the length of a wagon spoke," when his wagon was overturned and he was thrown from his position on the load, a distance of about ten feet to the ground, striking upon his back and hips and seriously injuring him; that as a result he was confined to his bed for about three weeks, and has never since been able to do his regular work and at the time of the trial, fifteen months after the accident he was suffering from a chronic injury at the sacro-iliac joint which so affected the nerves, leaving the spinal cord at this point that supply the lower limbs, that a portion of his body was affected with anaesthesia, the action of his legs was limited, he could not walk without a halt, could not cross his legs, could not stoop over, reflexes were impaired, entirely gone in the right knee, could not lie upon his left side without great pain and could not do his ordinary work. During all of this time since the accident he had suffered great pain and, in the opinion of his physicians, his injuries were permanent.

The case was tried before one of the justices of the Superior Court and a jury and a verdict was rendered in favor of the plaintiff, damages being assessed in the sum of \$2,500. Thereupon the defendant petitioned for a new trial and as grounds therefor alleged: 1. That said verdict is contrary to law. 2. That said verdict is contrary to the evidence. 3. That said verdict is contrary to the evidence and the weight of the evidence. 4. That said verdict is contrary to the law and the evidence and the weight of the evidence. 5. That the said verdict is excessive. 6. That the jury acted in rendering said verdict through bias, passion and prejudice. This motion was heard and denied by the justice

who presided at the trial, and the defendant took an exception to said ruling and incorporated the same together with the other exceptions, taken by him during the course of the trial, in his bill of exceptions which has been duly filed, allowed and prosecuted and the case is now before us for consideration upon the validity of said exceptions.

As the evidence was conflicting concerning the cause and effect of the accident a question of fact was presented which was entirely within the province of the jury to decide. The jury found for the plaintiff and their verdict has been approved by the justice of the Superior Court who presided at the trial, who had the same opportunity for observation of the witnesses as the jury had. In the absence of evidence that the verdict was the result of bias, passion or prejudice or of some other improper motive, or that the judge erred in his approval of the verdict under the rule referred to in *Wilcox v. The Rhode Island Company*, 29 R. I. 292, the verdict will be sustained. There is nothing to indicate that the jury disregarded the instructions of the court which constituted the law in the case for them, and therefore the verdict cannot be said to be against the law. We cannot say that it is against the evidence or the weight thereof. Nor are the damages so large as to shock the conscience of the court. There was no evidence introduced before the trial judge, upon the motion for a new trial, tending to sustain the sixth ground thereof and the motion was properly denied. The defendant's exception to the ruling denying the said motion is therefore overruled.

The defendant also relies upon the remaining portion of his bill of exceptions founded, as he states: "*First*—Upon Evidence and Rulings thereon, as appear on pages 23–26, 179–181, 189, 190, 326–327, 362, of the transcript of evidence in said cause filed in the office of the Clerk of the Superior Court for said county by said defendant with this his bill of Exceptions, that is,—

"1. In the direct examination of the plaintiff, Walter R. E. Beebe, the plaintiff's counsel inquired in regard to the

plaintiff's money losses on certain wood and manure, as appears on pages 23-24 of the transcript of evidence, and asked the following question, 154 Q. (page 24) 'How much loss do you figure on that?' to which the defendant objected. The objection was overruled, to which ruling of the court the defendant duly excepted. (See page 25 of the transcript of evidence.)

"2. Continuing the direct examination of the plaintiff on the same subject, the plaintiff's counsel asked of said witness, Walter R. E. Beebe, the following question, 157 Q. (page 25) 'How much, Mr. Beebe, did you lose on that, I will ask you in money?' to which the defendant objected. The objection was overruled, to which ruling of the Court the defendant duly excepted. (See page 26 of the transcript of evidence.)

"3. In the direct examination of the plaintiff's witness, George B. Parker, the plaintiff's counsel attempted to show the record of the town council of Coventry in regard to a paper (afterwards offered and admitted and marked 'Plaintiff's Exhibit A'), pages 179-181, and asked the following question, 13 Q. (page 179) 'What does the record show?' to which the defendant objected. The objection was overruled, to which ruling of the Court, the defendant duly excepted. (See page 181 of the transcript of evidence.)

"4. In the course of the plaintiff's case the plaintiff offered to introduce a paper marked 'Plaintiff's Exhibit A,' page 189, to which the defendant objected. The court admitted the paper against the objection of the defendant, to which ruling of the Court the defendant duly excepted. (See page 189 of the transcript of evidence.) (Also see page 190.)

"5. Immediately thereafter the plaintiff offered to introduce as evidence another paper which purported to be a copy of the original claim, so-called, and which copy bore an indorsement made by Mr. Champlin, the plaintiff's counsel, which pretended to state the time and manner of presentation of the said claim to the town council, to the introduction

of which paper (afterwards marked 'Plaintiff's Exhibit B. '), the defendant objected. The objection was overruled, to which ruling of the court the defendant duly excepted. (See page 190 of the transcript of evidence.)

"6. During the recross-examination of the defendant's expert witness, Doctor Charles A. McDonald, pages 326-327, the Court questioned the witness at some length on the question of whether there is any movement of the sacro-iliac joint in the ordinary man; the Court made the statement that certain doctors had testified before him in another case that movement was extremely rare, to which observations and questions by the court the said defendant objected and duly excepted. (See page 327 of the transcript of evidence.)

"*Second.* At the conclusion of the testimony the defendant asked the Court to direct a verdict for the defendant on the following grounds, 1st, that there is a material variance between the declaration and notice and the testimony in the location of the alleged defect; 2nd, that there was no sufficient evidence of notice to the town; and 3rd, that a verdict ought to be directed by the Court on the testimony generally applying to the existence of such a hole, gully, or washout at the place designated. (See page 362 of the transcript of evidence.) This motion was denied by the court, to which ruling of the court the defendant duly excepted. (See page 362 of the transcript of the evidence.)"

- (1) The first exception arose in the manner following: The plaintiff, in direct examination, was asked by his counsel: "150 Q. Have you met with any money loss by reason of this accident? A. I have. 151 Q. How much? MR. FROST: Wouldn't it be proper to state the items? MR. CHAMPLIN: He can after. 152 Q. About how much? A. Must have been six or seven hundred dollars. 153 Q. Well, now, how do you figure that? A. Well, I bought 125 cords of wood of a man called Lewell Whitman a little ways from where I lived and I had the wood sold. I had 50 cord of manure sold to Mr. Clarke which I could pay anyone a dollar a cord in Providence bring a load of manure back at

Hope \$5. I sold the load at a loss. I paid \$3 for the wood and sold it for \$2.75. I was laid up so long I had to pay \$5 for manure. I hired a man to handle it and furnish the team myself. 154 Q. How much loss do you figure on that? MR. FROST: We object to that on the ground that it isn't alleged in the declaration that he lost any contract by means of this injury. THE COURT: There isn't anything about any special contract. MR. CHAMPLIN: His business was the teaming business and if he was incapacitated from doing the work it is proper to show what it amounts to. THE COURT: There isn't any contract. What he is trying to prove is that he bought some wood and expected to sell it for a certain price and actually sold it at a loss. MR. FROST: It seems to us that it is objectionable. THE COURT: I will let you put it in. Exception taken by Mr. Frost." The court was clearly right; there was no claim of lost contract and the exception is overruled.

- The defendant's second exception is based upon the testimony of the plaintiff following the first exception taken (2) by the defendant, viz.: "155 Q. I will ask you what occasioned this loss, Mr. Beebe, in the wood, take it first? A. I wasn't able to attend to it, wasn't able to see to my business. 156 Q. And how much do you figure that you lost on this wood and manure? A. The wood was worth \$6 a cord for me in the city. The manure would cost me a dollar a load and it was worth \$6 back at Hope. I sold the wood for \$2.75 a cord. 157 Q. How much, Mr. Beebe, did you lose on that, I will ask you in money? A. I lost—MR. FROST: I object to that. MR. CHAMPLIN: I am trying to find out the actual amount. THE COURT: I will let him answer the question. A. Lost \$300. Exception taken by Mr. Frost." It appears from the foregoing testimony that the plaintiff had 125 cords of wood at or near Hope; that there was a market for the wood in Providence at \$6 a cord; that he could purchase manure in Providence for \$1 a cord and that there was a market for it at Hope at \$6 a cord. He was a teamster and here was steady employment in carrying wood

in one direction and manure in the other without the disadvantage of drawing an empty wagon in either direction. If he was deprived of the opportunity of transporting this merchandise in consequence of the injury sustained through the negligence of the defendant, he was damaged thereby and was properly allowed to testify concerning the same. There was nothing speculative involved in the testimony. The defendant's second exception is overruled.

(3) The third exception arose during the examination of the town clerk of the town of Coventry, who had been recalled as a witness by the plaintiff for the purpose of testifying concerning the town council's record of the plaintiff's claim for damages against the town: "12 Q. Does the record of the town council show anything in regard to that? A. Yes, sir. 13 Q. What does the record show? A. A claim for the damages from Walter R. E. Beebe on account of injury. Objected to by Mr. Frost. MR. CHAMPLIN: I had notice last Friday that was the only way. This is wholly unnecessary and we have gone to this trouble at their suggestion. MR. PARKER: There was nothing said of this kind at all. If you are going to use any records we are entitled to three days' notice and we have had no such notice. THE COURT: It is only a question of surprise and it is entirely under the discretion of the Court. You objected the other day when the officer who served it was present. You objected to a certified copy of the paper without the clerk, now you object to this paper and the clerk. Here is the original that was served on the clerk and if there is a copy made by him it isn't the original, but if it is the paper filed by the plaintiff, himself or his attorney, that is the original and the other is a copy. I don't know the name of the officer who called there. He had one paper in his hand signed by the plaintiff or his attorney and served a copy on the town clerk, that is the copy, but if both papers are signed by the plaintiff or by his attorney, the paper served on the town clerk is the original. I shall rule that now. MR. FROST: I object. THE COURT: Introduce both if you

want to. MR. CHAMPLIN: This is the actual document served upon the town clerk as I remember it. THE COURT: 'Walter R. E. Beebe by his attorney Champlin,' you have to identify your signature, I think it is admissible. I expect you have gone as far as you can by this town clerk. MR. CHAMPLIN: He is able to prove by the records of the council. THE COURT: I will allow you to read that record. Exception taken by Mr. Frost. A. 'A claim for damages from Walter R. E. Beebe on account of injuries alleged to have been caused by a defective highway was presented and referred to the town solicitor and the road surveyor with instructions to investigate it and report.' 14 Q. That was under what date? A. Monday, March 14, A. D. 1910." The defendant urges that the court ought not to have allowed the record of the town council of Coventry, in regard to the claim of the plaintiff, to have been read because no notice had been given to the defendant under the provisions of Rule 19 of Rules of Practice of the Superior Court. The rule provides *inter alia* that "No paper which is not set forth or substantially stated in the pleadings, . . . shall be used by either party as evidence before the jury, unless notice of the same . . . shall be given to the opposite party at least three days before the trial. . . .," &c. But the plaintiff's declaration contains the following allegation: "And the plaintiff further avers that within sixty days after the happening of the aforesaid accident he duly presented to the town council of the town of Coventry a particular account in writing of his claim and damages and demand, and how and when and where the same was incurred, and further that just and due satisfaction has not been made to him by said town of Coventry for his said injuries and damage within forty days after the presentation of his said claim." We are of the opinion that the record was of a paper substantially stated in the pleadings and that the exception is without merit and is therefore overruled.

- (4) The defendant's fourth exception has relation to the admission as evidence of notice to the town under Gen. Laws, 1909, cap. 46, Sec. 16, which reads as follows: "A person so

injured or damaged shall, within sixty days thereafter, give to the town by law obliged to keep such highway, causeway, or bridge in repair, notice of the time, place, and cause of such injury or damage; and if the said town shall not make just and due satisfaction therefor, within the time prescribed by section twelve of this chapter, he shall, within one year after the date of such injury or damage, commence his action against the town treasurer for the recovery of the same, and not thereafter;" of plaintiff's Exhibit "A," which reads as follows: "To the Honorable Town Council of the Town of Coventry. Walter R. E. Beebe, of the town of Coventry, respectfully presents his claim against the town of Coventry for damages received by him by reason of a defect in the public highway, known as the Washington and Bowen's Hill Road and says:—that he was travelling along said Washington and Bowen's Hill Road, a public highway in said town of Coventry, on the 13th day of January, A. D. 1910, with a heavy wagon loaded with hay upon which he was riding, and when he was at a point on said road about 60 feet east, or on the down hill side of a certain gateway leading into the Bowen Cemetery, so-called, at about 2 o'clock p. m., on the date aforesaid, said wagon was, by reason of a defect in said highway, overthrown and he was precipitated from said load of hay to the ground and severely injured. Said defect consisted of a hole, depression or gully in the said highway at the point aforesaid about two feet deep, which said defect had existed for a long time previous to the aforesaid date, but of the existence of which the said Walter R. E. Beebe had no knowledge. And at the time of the happening of the aforesaid accident the said Walter R. E. Beebe was in the exercise of due care. As a result of said accident said Walter R. E. Beebe was severely injured, his wagon was broken and his horses injured, to the damage of said Walter R. E. Beebe, three thousand dollars.

"WALTER R. E. BEEBE,

"By his attorney,

"William R. Champlin.

"Dated at Coventry this
12th day of March, A. D. 1910."

Upon the back of the same appears the following return:

"Served March 14th, 1910, Lewell M. Whitman, Deputy Sheriff."

The defendant claims that this is not such a notice as is required by the statute aforesaid and was not served upon the town within sixty days according to law and argues as follows: "Exhibit A. ought not to have been admitted in evidence.

"1. It was not the NOTICE required by statute, but was a CLAIM for damages.

"What is 'notice' required by General Laws, 1909, Chapter 46, Sec. 16?

(a) "In this case the plaintiff presented HIS CLAIM against the town of Coventry for damages received by him by reason of a defect in the public road, known as the Washington and Bowen's Hill Road. (See claim 'Exhibit A.')

(b) In the declaration the plaintiff alleges 'that within sixty days after the happening of the aforesaid accident he duly presented to the town council of the town of Coventry a *particular account in writing of his claim* and damages and demand, and how and when and where the same was incurred. (See Declaration.) Evidently the plaintiff acted under the provisions of General Laws, 1909, Chapter 46, Section 12, for the language of his claim as presented and the language of the declaration agree with the language of Section 12, and not with the provisions of Section 16. Section 16 requires 'NOTICE' of time, place and cause of injury. Section 16 is applicable to injuries on highways. Section 12 to cases not for injuries received on highways. Plaintiff acted under a misconception of the nature of his right to satisfaction.

(c) "'Where information of a specific claim or right is given to a person it has been held that such information is operative only in respect to the particular fact communicated, and will not put the person notified upon inquiry as to any other or different right. Thus express notice of a claim based on grounds stated in the communication operates as notice only of the specific claim mentioned, and does not put the party

notified upon inquiry as to another claim based upon different grounds, although it be the same person and relate to the same subject matter.' 21 Am. & Eng. Enc. of L. 2nd ed., 587-8.

(d) "Notice is not synonymous with knowledge. *Thomas v. City of Flint*, 81 N. W. 936, 123 Mich. 10, 47 L. R. A. 499; 5 Words and Phrases, Etc., 4842.

(e) "Speaking of a notice to quit, Bosworth, J., said in *Congdon v. Brown*, 7 R. I. at page 21, 'The law requires a notice in writing. No particular form is necessary. It should be reasonably certain,—*Such as to appear to be a notice to quit*.....'"

(f) The communication presented by the plaintiff in the case at bar does not appear to be a notice of the incurring of personal injuries on a highway for which the town may make satisfaction if they see fit, but a CLAIM for money DUE, &c., presented under and expressed in the language of a different section of the law. THIS THEN IS NOT THE NOTICE REQUIRED BY THE STATUTE.

(g) The giving of proper notice is a condition precedent to the maintaining of the suit. *Batchelder v. White*, C. T. 28 R. I. 466.

2. It was not proved that the notice was presented to the town council or to the clerk within the statutory time.

(a) The accident happened between 1:30 and 2 o'clock. (Ev. 278). Witness was eating his dinner. (Ev. 278.)

(b) The claim got into the hands of the town council on March 14, 1911, the sixtieth day after the day of the accident. But there is no certain or creditable proof of the HOUR of service. The burden is on the plaintiff to prove proper service. Lewell Whitman, the deputy sheriff who served the claim, can remember nothing about the circumstances except that he afterwards went into the office of the plaintiff's attorney and the plaintiff's attorney made a note (incorrectly referred to as a return during the course of the trial) on the back of a copy of the claim served, and Mr. Whitman signed it. Mr. Whitman does not remember whether the town

council was in session or not, nor to whom he handed the original claim. His memory could not properly be refreshed by a note which he did not make himself, and he ought not to testify from even a note made by himself unless on looking at the note his memory is refreshed and he is able then to testify of his own remembrance what he did on March 14, 1911, in regard to service of the claim. (c) *Computation of time of notice.* But General Laws, 1909, Chapter 46, Sec. 16, says, 'A person so injured or damaged shall within sixty days thereafter, give.....notice.....' etc.

"In *Seamons v. Fitts*, T. T. (E. G.) 21 R. I. 237, the Court said, at bottom of page 241, 'The statute provides that the person injured shall *within sixty days thereafter* give the required notice, which means, of course, that the notice shall be given within sixty days of the occurrence of the injury or damage.'

"'The words 'time and place' in General Statutes, 1902, Sec. 1130, requiring a description in the notice of the time and place of occurrence of the injury, means a statement of the day and hour when, and a description of the locality where, the person injured received the direct injury to his person or property from the defendant's negligent act, as nearly as these facts can be given.' *Peck v. Fair Haven & W. R. Co.*, 58 Atl. 757, 758, 77 Conn. 161.

"In *Taylor v. Peck*, T. T. (Bristol) 29 R. I. 482, 'the Court said that the purpose of requiring time to be stated is that the town may prove the plaintiff was not at the place specified at time specified.'

"The plaintiff has stated the time as about 2 p. m., Jan. 13, 1910. (See Exhibit A.)

"'In computation of time, when the time must be computed from an act done, the day on which the act is done is to be included, especially where the computation must be from and after the doing of the act.' *Arnold v. United States*, 13 U. S. (9 Cranch) 104, 105, 3 L. ed. 671; 8 Words and Phrases, Etc., 6974.

"The contention of the defendant is that the claim was

served on the 61st day after the injury; that the day on which the accident occurred must be included. *Arnold v. United States*, *supra*, 8 Words and Phrases, Etc., 6974; *Seamons v. Fitts*, *T. T. supra*, at p. 241."

We see no merit in the objection and foregoing argument of the defendant. To say of the paper presented by the plaintiff to the town council (Plff's Exhibit A.) that it was not a notice but a claim, is to quibble with words; it was notice of a claim for damages for injuries alleged to have been received in one of the highways of the town through a defect therein, and contained information as to the time, place and cause of such injury or damage; such information amounts to notice. "Notice. The information given of some act done, or the interpellation by which some act is required to be done." Bouv. Law Dict. "Notice, in its legal sense, may be defined as information concerning a fact actually communicated to a party by an authorized person, . . ." &c. 29 Cyc. 1113 and cases cited. "In cases, generally, where notice is required, if notice is substantially given so that the party is fully informed, an error of description which does not mislead, may be disregarded, or may be aided by other proof," per Bosworth, J., in *Congdon v. Brown*, 7 R. I. at p. 21. Even if in the present case the plaintiff had erred in calling his notice a claim, as notice had been substantially given and the description did not mislead the defendant, the error may be disregarded. The notice was duly served upon the town council. The accident occurred on the thirteenth day of January, 1910, one day thereafter was January 14, 1910, and sixty days after the accident must be March 14, 1910, therefore notice served on March 14, 1910, was served within sixty days after the accident. Section 12 of Gen. Laws, 1909, cap. 32, "Of the construction of statutes," (5) reads as follows: "Sec. 12. Whenever time is to be reckoned from any day, date, or act done, or the time of day of any act done, such day, date, or the day when such act is done, shall not be included in such computation." The hour of the accident is therefore immaterial in the computation of

the sixty days and the service was regular, as to time, if made within the period of sixty days after the day of the accident. For these reasons the defendant's fourth exception is overruled.

The defendant's fifth exception relates to the admission in evidence of what appears to be a duplicate original of the plaintiff's exhibit A. with the officer's return thereon that "In Coventry this 14th day of March, 1910, at 11-45 a. m. I have served a true and attested copy of the within notice upon George B. Parker, Town Clerk of the Town of Coventry, Lewell M. Whitman, Deputy Sheriff." No harm was done by such admission and the defendant's fifth exception is overruled.

- (6) The defendant's sixth exception relates to the conduct of the court in questioning Dr. Charles A. McDonald, a witness for the defendant, in the manner following: "THE COURT: What do you mean by the relaxed sacro-iliac joint, do you mean more movement than normal? WITNESS: It is abnormal movability of the joint. THE COURT: There is no movement ordinarily? WITNESS: A slight movement. THE COURT: Don't all physicians say it is very rare to find any movement in the ordinary man? WITNESS: Not today, five years ago they said that. THE COURT: Didn't you testify in the case of Miller v. The Rhode Island Company? WITNESS: That is Doctor William McDonald. THE COURT: Do you know Doctor Parmenter of Boston and Doctor Howard and Doctor Lovett? WITNESS: Yes. THE COURT: Would you be surprised that they said it was extremely rare, they had only known two or three cases of movement of the sacro-iliac joint? WITNESS: I should be surprised if they said it. THE COURT: It has only been about five years that there has been very much written on the subject? WITNESS: That is all. THE COURT: Do physicians say generally that only in cases of women having childbirth and sometimes in other pelvic cases you get any movement of the sacro-iliac joint? WITNESS: Yes, sir. THE COURT: Isn't that statement made? WITNESS: Yes,

very commonly by orthopaedic surgeons. THE COURT: These three surgeons testified before me. WITNESS: I am not sure they said that because they write right to the contrary. MR. FROST: It does strike me as though that isn't before this court and ought not to be before this jury. THE COURT: Object to anything you want to on the record and take any exception to the question the court has asked if you want to. Exception taken by Mr. Frost." The judge then said: "The jury ought not to attach any importance to anything I said in the way of being affirmative testimony. I am not a witness and I don't want you to attach any importance to it as testimony. It was a subject which greatly interested me in that case and I had to read the testimony two or three times and I knew it was a rather interesting question among surgeons as being somewhat discussed recently."

The portion of the above remarks most strongly objected to by the defendant are the following: "Would you be surprised that they (Doctors Parmenter, Howard and Lovett), said it was extremely rare, they had only known two or three cases of movement of the sacro-iliac joint?" and "These three surgeons testified before me," to which question and statement the witness made the following replies, respectively: "I should be surprised if they said it," and "I am not sure they said that because they write right to the contrary." The danger to be apprehended, from the conduct of the court in the premises, was that the jury before whom the case was being tried, might get the impression that the judge's recollection of the testimony of these surgeons, given in another case before him, was contained in the question propounded to the witness and was evidence for them to consider in arriving at a verdict. There might have been some ground for this apprehension if the court had ignored the objection made by the defendant or had allowed the jury to form their own conclusions in the matter without giving them suitable instructions concerning the same. But the court forthwith expressly instructed the jury that he

was not a witness and was not testifying in asking the questions and in making the remarks that he did, and they were duly cautioned not to attach any importance to it as testimony. It is very evident that the judge was trying to ascertain how positive the witness was in regard to the position that he had assumed on the question of motion in the sacro-iliac joint.

- The court had a perfect right to interrogate the witness for the purpose of inquiring what he meant by the expression "relaxed sacro-iliac joint." If a witness, expert or ordinary,
- (7) ecclesiastical or lay, makes use of language that does not convey a distinct and clear meaning to the mind of the court it is fair to presume that ordinarily it will not have a clearer meaning in the minds of the jurors. It is not only the right, but it is the duty of the judge presiding in the trial of a case to lend his aid in the elicitation of the truth from witnesses, and to see that the same is not concealed, obscured or buried in a mass of unintelligible verbiage, or in technical expressions, meaningless to a layman, when the same can be reduced to the simple terms of every-day language without detriment, and he may always inquire of an expert or other witness what he means by a certain expression he has used for the purpose of allowing the witness to clarify his meaning by the selection and use of other words. The court, in the matter under consideration, did not exceed his discretion in the premises, and properly instructed the jury concerning the same. The defendant's sixth exception is therefore overruled.
- (8) The last exception has reference to the refusal of the court to grant the defendant's motion, made at the conclusion of the testimony, to direct a verdict for the defendant. The first ground is that there was a variance between the notice given to the town and the plaintiff's declaration based thereon and the proof relative thereto offered at the trial. The notice and declaration placed the defect at about sixty feet east of the gateway leading into Bowen's cemetery. The plaintiff testified that the defect was twenty paces

“from the east gate post leading into the so-called Bowen Cemetery to the bar way down hill to the left.” Horatio Colvin, road surveyor of the town of Coventry, a witness for the defendant, testified in direct examination concerning this matter as follows: “45 Q. From that east line to where the entrance was to the cemetery do you know about how many feet it was down there by the road, the barway, can you tell, Mr. Witness? MR. CHAMPLIN: Does he know first. THE COURT: The question is do you know what the distance is? A. Yes. 46 Q. Approximately, what is about the distance? A. 62 feet.” John W. Rathbun, a surveyor, who surveyed this portion of the road and made a plat thereof for the defendant, was called by the defendant as a witness and testified that the distance from the east abutment of the gateway of the cemetery to the west abutment of the barway as determined by him from measurements made on said plat, was “67.10 to the west abutment of the bar.” Other witnesses for the plaintiff testified that the distance between the points aforesaid was about sixty feet. We find no variance between the allegation and proof. In the case of *Maloney v. Cook*, 21 R. I. at p. 475, Tillinghast, J., speaking for the court, used the following language: “We do not wish to be understood, by what we have said, as holding that a notice given under the statute ought to be construed with technical strictness; but that it is sufficient if it gives to the officers of the town or city ‘information with substantial certainty as to the time and place of the injury, and as to the character and nature of the defect which caused it, so as to aid them in investigating the question of liability of the town.’ *Spellman v. Chicopee*, 131 Mass. 443. See, also, *Lilly v. Woodstock*, 59 Conn. 219, at p. 221; *Stedman v. City of Rome*, 34 N. Y. Supp. 737; *Werner v. Rochester*, 77 Hun. 33.” We are of the opinion that the notice in question gave to the officers of the town “information with substantial certainty as to the time and place of the injury, and as to the character and nature of the defect which caused it, so as to aid them in investigating the question of liability of the town.”

- The remaining grounds for the motion to direct a verdict for the defendant, as appears by the transcript of testimony, &c., are: "Second, that the town had no sufficient notice of the defect and, third, that the hole was impossible to have been there." We think that the third ground is too general
- (9) to be considered. So many things are possible that it is difficult to accurately determine what is impossible. To determine that it was impossible for the hole to have existed in the highway under snow on January 13, 1910, at about two o'clock in the afternoon is to exclude every hypothesis in favor of its existence, and to discredit every witness who testified that it did exist. It is for the jury and not for the court to pass upon the credit to be given to the witnesses and the weight of their testimony. We should hesitate to take a case away from the jury or to compel a verdict from them, upon the ground that something, which was the subject of human testimony, was absolutely impossible. In our opinion the court wisely declined to grant the motion upon this ground. The second ground was the subject of affirmative and negative testimony; witnesses for the plaintiff testified that the defect existed and witnesses for the defendant testified that they did not see any defect, although they
- (10) were looking for defects. There was therefore evidence to be submitted to the jury under suitable instructions from the court. The court did not err in declining to grant the motion and the defendant's exception, based upon said refusal is overruled.

All of the defendant's exceptions are overruled, and the case is remitted to the Superior Court in and for the County of Kent, with direction to enter judgment on the verdict.

William R. Champlin, for plaintiff.

E. K. Parker, W. Louis Frost, for defendant

OPINION OF THE JUSTICES OF THE SUPREME COURT TO THE
GOVERNOR IN THE MATTER OF THE METROPOLITAN PARK
LOAN.

(1) *Constitutional Law. Metropolitan Park Commissioners.*

Gen. Laws, 1909, cap. 238, §§ 7 and 8 "of the Metropolitan Park Commissioners" providing for the appointment of commissioners to determine the proportion in which the cities and towns constituting the metropolitan park district, shall annually pay money into the state treasury to meet the requirements and expenses under said act as estimated by the general treasurer and commissioners, and providing that the award of the commissioners after being accepted by the superior court, shall be final and binding on all parties and that the sum so estimated shall be included in the assessment of the annual state tax against the said towns and cities, is not obnoxious to Cons. R. I. Art. I, § 2, "the burdens of the state ought to be fairly distributed among its citizens," nor to Art. I, § 15, "the right of trial by jury shall remain inviolate," nor to Art. I, § 16, "private property shall not be taken for public uses without just compensation," nor to Art. IV, § 2, as a delegation of legislative power, nor to U. S. Cons. Art. XIV of amendments, "nor shall any state deprive any person of life, liberty or property, without due process of law."

(2) *Police Power. Constitutional Law.*

Cap. 238, Gen. Laws, 1909, contemplates the improvement and conservation of the public health, and was passed in exercise of the police power of the state. It is therefore entitled to a liberal construction.

(3) *Constitutional Law. Burdens of the State.*

How the burdens of the State shall be fairly distributed, is a question of a purely legislative character, with which the judicial department has no concern, where the legislative discretion has been exercised honestly and in good faith and not for the purpose of personal oppression under color of law.

(4) *Constitutional Law. Metropolitan Park Loan.*

There is no constitutional objection to the authorization of the legislature by the people, to provide for State bonds not to exceed \$300,000 for the acquirement and improvement of real estate for public reservations and parks in the metropolitan park district; the amount expended to be repaid to the state in accordance with the provisions of Gen. Laws, 1909, cap. 238.

(5) *Constitutional Law. Local Self-Government.*

The State constitution is silent as to local government and nowhere attempts to restrain the power of the legislature over the various cities and towns.

(6) *Metropolitan Park Loan.*

The obligation of repayment of amounts expended under Gen. Laws, 1909, cap. 238, and under the resolution referred to in a request for an opinion of the court, falls only upon the cities and towns within the metropolitan park district.

April 17, 1912.

To His Excellency, Aram J. Pothier, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a request for our opinion upon the following questions, viz.:

"1. Are Sections 7 and 8 of Chapter 238 of the General Laws, 1909, unconstitutional and void because in violation of any provision of the State or Federal constitution, especially Article I, Sections 2, 15 and 16, and Article IV, Section 2 of the State Constitution, and that portion of Article XIV of amendments to the Federal constitution as follows:
. . . 'nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

- (1) "2. If the foregoing question is answered in the negative, is there any constitutional objection to the authorizations and directions in the following resolution now pending in the General Assembly:

" 'RESOLVED: That the following proposition be submitted to the people for their approval or rejection at the general election to be held on the Tuesday next following the first Monday in November, 1912.

" 'METROPOLITAN PARK LOAN.

" 'Shall the General Assembly be authorized and directed to provide for the issue of state bonds not to exceed the amount of three hundred thousand dollars for the acquirement and improvement of real estate for public reservations and parks in the Metropolitan Park District of Providence Plantations; the amount thereof expended to be repaid to the state in accordance with the provisions of Chapter 238 of the General Laws. These bonds to be issued from time to time in such amounts and upon such terms as the General Assembly may hereafter determine?"

“3. Does the obligation of repayment of amounts expended either under said Chapter 238 and the additions and amendments thereto, or under said resolution fall upon the state as a whole or only upon the cities, towns and voting districts constituting the Metropolitan Park District of Providence Plantations?”

In response to these questions we have the honor to submit the following opinion:

Gen. Laws, 1909, cap. 238, is the first act in said compilation of the statutes that appears under “Title XXIII of FORESTRY and PARKS ” and is itself entitled: “Of the Metropolitan Park Commissioners.” An examination of its provisions discloses the fact that it deals with the “advisability of laying out ample open spaces for the use of the public,” within the Metropolitan Park District of Providence Plantations, which includes the cities of Providence, Pawtucket, Central Falls and Cranston; the towns of East Providence, Warwick, Johnston, North Providence, Lincoln, Barrington and the voting districts numbers three, four, and five in the town of Cumberland; that these open spaces are to be used for exercise and recreation and for intercommunication between them and adjacent streets and highways. It thus appears that the chapter contemplates the improvement and conservation of the public health by encouraging out of door exercise and recreation in parks and parkways within its most densely populated area. It is therefore apparent that the statute in question was passed by the legislature in exercise of the police power of the State. In such circumstances the statute is entitled to a liberal construction in order that its beneficial influence may not be impeded. The seventh and eighth sections of the chapter, towards which our attention is especially directed by the questions under consideration, respectively read as follows: “Sec. 7. The superior court shall, on the application of the said metropolitan park commissioners, and after notice to each of the cities and towns hereinbefore designated, appoint three commissioners who shall not be residents of such

cities and towns, who shall, after the notice and hearing, and in such manner as they shall deem just and equitable, determine the proportion in which each of such cities and towns shall annually pay money into the treasury of the state for the term of five years next following the year of the first issue of said scrip or certificates of indebtedness, to meet the interest and sinking-fund requirements for each of said years as estimated by the general treasurer of the state, and to meet the expenses of preservation and necessary care of said public reservations as estimated by the metropolitan park commissioners and certified by them to the general treasurer, and any deficiency in the amount previously paid in as found by said treasurer, and shall return their award into said court; and when said award shall have been accepted by said court the same shall be final and conclusive adjudication of all matters herein referred to said commissioners and shall be binding on all parties. Before the expiration of said term of five years, and every five years thereafter, three commissioners who shall not be residents of any of the cities or towns constituting the metropolitan park district shall again be appointed as aforesaid, with the same powers and duties for the next succeeding term of five years: *Provided*, that no assessment shall be levied for the purposes of this chapter in any one year upon any city or town in excess of a sum equal to one-half mill on the dollar of the valuation thereof. The superior court shall have jurisdiction in equity to enforce the provisions of this chapter and shall fix and determine the compensation of all commissioners appointed by said court under the provisions hereof.

“Sec. 8. The amount of money required each year from each city and town of the said metropolitan park district of Providence Plantations to meet the interest, sinking-fund requirements, and expenses aforesaid for each year, and the deficiency, if any, shall be estimated by the general treasurer in accordance with the proportion determined as aforesaid, and shall be included in and made a part of the sum charged in such city or town, and shall be assessed upon it in the

apportionment and assessment of its annual state tax. The general treasurer shall in each year give notice to each city and town aforesaid of the amount of such assessment, and each of such cities and towns shall pay its respective assessments, so determined as aforesaid, into the state treasury at the time required for the payment of, and as a part of, its state tax."

The foregoing provisions are not in conflict with the constitution of Rhode Island, Art. I, § 2, which reads as follows: "All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens."

In the case of *In re Dorrance Street*, 4 R. I. 230, Ames, C. J., at p. 249, used the following language in reference to the last clause of the foregoing section: "We will not stop to notice the very general language and declaratory form of this clause; setting forth principles of legislation rather than rules of constitutional law—addressed rather to the general assembly by way of advice and direction, than to the courts, by way of enforcing restraint upon the law-making power. We do not mean to say that a law, purporting to impose a tax or burden of some sort upon the citizen, may not be in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness, as not to come so far within the purview of this general clause, as to enable the court to save the citizen from oppression by declaring it to be void. But evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was intended to be reposed in the general assembly by the will of the people, as signified in this clause of the constitution. The form is 'ought to be,' the word is 'fairly' distributed, not 'equally' even—unless equality be fair, which it is not always in any sense, and never is in some senses; and especially, the words are not 'equally upon property,' or words to that effect, as in the constitution of Louisiana." . . .

“Indeed, the language in question can hardly be said to impose any restriction upon the assembly at all, except what would be imposed by the fact of our free institutions, and the general principles of constitutional law, here and everywhere in this country prevalent. Had the constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles, than seems to be studiously implied in the form, spirit, and general terms of this sentence.” And later at p. 250 he uses these illuminating expressions: “All taxation is more or less unfair, and in any proper sense, even unequal. Perfect fairness would be, to make all those who are benefited by the burdens of the state to bear them, and to extend the burden in due proportion to every person according to this benefit. Take, for instance, the streets of Providence used by all the inhabitants of the state, nay, of the country, who have occasion to resort hither for business, or pleasure, or instruction. The right of every one of these is as ample to use them, and is as ample, in any way, in them, as that of the rich citizen whose property pays a thousand dollars a year towards the enormous expense of their maintenance; and yet the law casts the entire expense of their maintenance upon those who happen to reside within the limits of certain jurisdictional lines, altered, from time to time, as convenience may require.”

- (3) The reasoning employed in the foregoing opinion is applicable to the consideration of the sections of the statute involved in the present inquiry. The question: how shall the burdens of the state be fairly distributed, is one of a purely legislative character to be answered by the law-making branch of the government in the exercise of a wise and wide legislative discretion, with which the judicial department has no concern, and over which it will not attempt to assume control where the same has been exercised honestly and in good faith and not for the purpose of personal oppression under color of law. As was said by Durfee, C. J., in *Cleveland v. Tripp*, 13 R. I. at p. 61, *et seq*: “Without doubt, the propriety of any given tax and the modes in which it shall be

apportioned and assessed are legislative matters, with which the courts will not interfere unless the legislature has palpably transgressed some limitation of the constitution. . . . But our constitution is extremely latitudinarian. It contains no restriction except what is implied in the declaration that 'the burdens of the State ought to be fairly distributed;' and this declaration, as was said in *In the matter of Dorrance Street*, 4 R. I. 230, 249, expresses no more than would be implied without it, 'from the fact of our free institutions and the general principles of constitutional law.' To entitle us to hold that the statute authorizing these assessments is unconstitutional, we ought to be satisfied, not only that fairer modes of assessment might be devised, but that the prescribed mode is indefensibly unfair; for in a matter of legislative policy, it will not do for the court to substitute their own judgment for that of the General Assembly, and to convict the General Assembly of fatal error simply because they differ from it in opinion." In the sections under consideration there is nothing to indicate any abuse of legislative discretion in the premises. Neither are the provisions of the sections in conflict with the constitution of the State, Art. I, § 15, which reads as follows: "The right of trial by jury shall remain inviolate." As this court decided in *Bishop v. Tripp*, 15 R. I. at p. 469: "The plaintiff also contends that the statutes authorizing the (sewer) assessments are void because they do not give the assessed the right of appeal, with trial by jury, and are therefore in conflict with the Constitution of the State, Article I, § 15, which declares that the right of trial by jury shall remain inviolate. Assessments for benefits have always been regarded in this State, and, so far as we know, in other states, as a species of taxation; and though tax assessments were before, and have been since, the adoption of the Constitution, subject to revision in the courts, they have never, to our knowledge, been subject to revision by jury trial. *Crandall v. James*, 6 R. I. 144. Therefore, we do not think the statutes are obnoxious to this objection. The Constitu-

tion requires simply the conservation, not an extension, of the right of jury trial." Nor do said provisions conflict with Section 16 of said Article I.: "Private property shall not be taken for public uses, without just compensation." "It has been observed that it is by no means easy to trace the dividing line between the power of taxation and the right of eminent domain, and it is true that both rest on substantially the same foundation, that is, both are exercises of the sovereign power to take private property for public use. In other respects, however, there is a very clear distinction which may readily be pointed out. Taxation exacts money or services from individuals as and for their respective shares of contribution to any burden; operates on a community or on a class of persons in a community; and is governed by some rule of apportionment. On the other hand, private property taken for public use by virtue of the right of eminent domain is taken, not as the owner's share or contribution to the public burden, but as so much beyond his share, and the exercise of this right operates on an individual and has no reference to the amount or value exacted from any other individual or class of individuals. And, again, special compensation is required to be made when property is taken in the exercise of the right of eminent domain, because the government is the debtor to the amount of the value of the property thus taken; but the payment of taxes is a duty of the citizen, and creates no obligation on the part of the government otherwise than to make a proper application of the taxes paid. The clause of the constitution requiring compensation to be made when private property is taken for public use is not a limitation on the taxing power, but it is held to guard against illegal exactions disguised under the name of taxation." 27 Amer. & Eng. Ency, 585 and cases cited.

It is apparent from an inspection of the foregoing sections that they make provision for the repayment by the cities and towns within the Metropolitan Park District, to the state, of money advanced and expended by the State in the

acquisition and maintenance of public parks and parkways within said district for the general benefit of the public, and the particular benefit of the residents of the cities and towns within said district whose proximity to the parks enables them to enjoy the benefits thereof with the expenditure of less time and money than those less fortunately situated because more remote from these sources of improvement and enjoyment. These are material compensations beyond and in addition to the enhanced value of property in the neighborhood of such public improvements.

The sections alluded to are not in conflict with the Constitution of Rhode Island, Art. IV, § 2, which reads as follows: "Sec. 2. The legislative power, under this constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together, the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws. The style of their laws shall be, *It is enacted by the General Assembly as follows:*" The question, without doubt, is put for the purpose of inquiring whether the general assembly has attempted therein to delegate its legislative power. We do not so understand the provisions of the sections. The commissioners appointed are to hear and determine what proportion of the total amount expended each city and town shall annually pay into the treasury of the state. Manifestly this is not a legislative duty, but is a duty similar to that imposed upon an auditor, as for example, to ascertain and state the assets and liabilities of the firm, including the accounts of the members thereof in the winding up of a partnership, or in the disentanglement of complicated accounts between litigants. As we said in the case of *Blais v. Franklin*, 31 R. I. at p. 115: "While the act confers on the commissioners certain authority and discretion as to their execution of the law, it does not confer on, or delegate to, the commissioners the power to make the law itself, nor to use any discretion as to what the law shall be." In the present case the proportion that each city and town shall pay is

dependent upon the amount of benefits received by it so that the question is largely one of computation involving arithmetical rather than legislative powers. The sections are not in conflict with that portion of Article XIV of amendments to the Federal Constitution which reads as follows: "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." We presume that the question involving the consideration of the above amendment to the federal constitution is similar to that propounded to us in the case of *Blais v. Franklin*, *supra*, p. 131: "Neither party in interest is heard as to the necessity of building a bridge nor as to the expense of the work or the kind, size or style of the bridge. The only hearing the cities of Pawtucket and Central Falls get is as to the apportionment of the expense." In the statute under consideration no provision is made whereby the cities and towns within the Metropolitan Park District may be heard as to the necessity for parks or parkways therein nor as to the size, style or cost of the same, nor as to the expense of their maintenance. The only hearing they will have will be the one concerning the apportionment of the expense upon them. The answer to this question will be the same as it was in the case last referred to: "There is no merit in this contention. No notice is required to be given property owners or municipal corporations respecting those matters which the legislature itself determines. *Spencer v. Merchant*, 125 U. S. 345; *Meier v. St. Louis*, 180 Mo. 391.

"As was said by Mr. Justice Brewer in *Williams v. Eggleston*, 170 U. S. 304, at p. 310, *et seq*: "It is further contended that the acts of May 24, 1895, and June 28, 1895, are in conflict with that portion of the Fourteenth Amendment which forbids the depriving of any person of life, liberty or property without due process of law, because, first, 'they deprive the town of the right to perform its town duties by officers of their own choosing which is contrary to the settled practice and law of the State, and arbitrarily destroys the

right which those towns had before the constitution of Connecticut was adopted and which was not taken away by that instrument; and, secondly, because the acts provide for arbitrarily taking the property of the inhabitants of Glastonbury without proper notice of any proceeding under which the property is to be taken and without opportunity to be heard.' Whatever may have been the practice of the State in the past it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and federal constitutions; and, that these acts in no way violate any provision of the state constitution is settled by the decision of the state Supreme Court. *Backus v. Fort Street Union Company*, 169 U. S. 557, 566, and cases cited. It is true that there was a division of opinion between the members of the state Supreme Court, but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the state court decides that municipal corporations within the territorial limits of the State are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the State court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations.

" 'Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed amendment. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. *Spencer v. Merchant*, 125 U. S. 345, 346; *Parsons*

v. *District of Columbia*, 170 U. S. 45. It should be noticed that no question is presented as to the necessity of notice before any property tax is cast upon the citizen. The only question is as to the power of the legislature to cast the burden of this improvement upon the five towns, towns which may have been already judicially determined to be towns benefited thereby. Although the apportionment made between the towns was not that determined by the judicial proceedings, yet it was one of which certainly the town of Glastonbury cannot complain, for the judicial apportionment was as to it reduced by the legislative act. In casting this burden upon the towns the legislature did not proceed without a hearing from the towns, for their representatives were in the legislature and took part in the proceedings by which the act was passed. So they had an opportunity to be heard, if such hearing was necessary, prior to the enactment of the law.'"

- (4) We see no constitutional objection to the authorization and directions contained in the foregoing resolution, now pending in the general assembly. The people of the state may well authorize the incurring of a state debt by the legislature, the proceeds whereof are to be expended in a well defined portion of the state to be repaid by the cities and towns within which the same has been expended in proportion to the amounts expended therein. Objection has been made that such a resolution is an interference with local self-government, and in support of this contention the cases of *Board of Park Commissioners v. Common Council of Detroit*, 28 Mich. 228; and *State ex rel. Gerry v. Edwards et al.* 42 Mont. 135, have been relied upon. The sufficient answer to this objection is that the Constitution of Rhode Island differs from those of Michigan and Montana in that it contains no reference to local government and nowhere attempts to restrain the power of the legislature over the various cities and towns within it. "The law-making power of the State," it is said in one case, 'recognizes no restraints, and is bound by none, except such as are imposed
- (5)

by the constitution.' That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity; and is therefore the paramount law. Its object is not to *grant* legislative power, but to *confine* and *restrain* it. Without the constitutional limitations, the *power* to make laws would be *absolute*." Cooley, Const. Lim. (7th ed.) p. 241.

(6) In answer to your last question we have the honor to reply that by the terms of said Chapter 238 and of the resolution hereinbefore referred to, the obligation of repayment falls only upon the cities and towns within the Metropolitan Park District of Providence Plantations.

EDWARD CHURCH DUBOIS,
CLARKE H. JOHNSON,
C. FRANK PARKHURST,
WILLIAM H. SWEETLAND,
WALTER B. VINCENT.

GEORGE A. PERRY *et al.*, Executors, vs. ROBERT P. BROWN
et al.

MAY 1, 1912.

PRESENT: Dubois, C. J., Johnson, and Parkhurst, JJ.

(1) *Wills. Construction.*

In the construction of a will, the intent of testator must be gathered from the whole will, and to ascertain the intention the court will consider the circumstances under which it was written, in order to look at it as far as possible from the testator's point of view.

(2) *Wills. Nature of Estates Created.*

Will construed and held; that while testatrix used language in the first instance, appropriate for the creation of a legal life estate in the entire residuary property, real and personal, the scheme of the will was based upon the establishment of a trust estate, entitling the husband to an equitable interest in the income only.

(3) *Will. Life Estates.*

Will construed and held; that language showing intention of giving husband of testatrix a life estate in the whole income was modified by later provisions showing intention that income from estate of husband should be used up

for his support and only such portion of estate of testatrix should be used as became necessary, after his own resources were exhausted.

(4) *Wills. Construction.*

The fact that testatrix used words in a provision of a holographic will which in their technical meaning would create a life estate, will not be allowed to override the plain intent of the provisions taken as a whole, so as to prevent the creation of a trust estate or to nullify other provisions of the will relating to the disposition of the income by the trustees.

(5) *Wills. Technical Words.*

Where the context or other parts of a will indicate that technical words are not used in their ordinary technical meaning, they will be interpreted in the sense intended by testator.

(6) *Wills. Accumulation of Income.*

Will construed and held; that from the language "all income exceeding what is necessary for taxes, repairs, incidental expenses and salary of trustees to be credited to my estate, but to be used freely for the benefit of my husband, whenever his own income does not prove sufficient; but always his own income is first to be expended upon him and then when necessary falling back upon the income accruing from my trust estate."

"And all of the residue of the net income, to pay to my husband for his own use if he be able to care for and use the same, if not, deposit it in the name of my trust estate to be used for any necessity for his comfort," it was the intent of testatrix that the trustees should accumulate the income, over and above such portion as might be expended for the support of the husband, and such accumulated income became a part of the trust estate to be distributed in accordance with the subsequent provisions of the will.

(7) *Wills. Accumulation of Income.*

If a part of the income of a trust estate is undisposed of, the trustees should, even in the absence of any provision, accumulate it and pay it to the legatees entitled to the original corpus of the estate.

(8) *Wills. Income. Anticipating Payment.*

Upon the question of anticipating the payment of surplus income during the life time of the life-tenant of a portion of such income, while it appeared that in all probability the principal of the trust estate would be sufficient to pay the pecuniary legacies, yet as large portions of both real and personal estate were specifically devised and bequeathed and other portions would have to be sold to raise the necessary funds, and it could not be known what would be realized from such sales, the court is not warranted in ordering payment of such income from time to time during life of life tenant, because it could not be determined at this time whether there was sufficient property to carry out all the provisions of the will and leave the accumulated income intact and for the further reason that the vested remainder was subject to open and let in any grandchildren born after death of testatrix, who might become entitled to share in the distribution of the residuary estate of which the accumulated income formed a part.

(9) *Wills. Vested Remainders.*

After leaving such portion of the income of a trust estate as was necessary for support of life tenant the residuary gift was as follows:—"Whatever may now be left of the so-called trust estate, I bequeath to the children and grandchildren of Maria and William Whipple Brown, of Providence, and Charlotte Perkins Gilman and daughter Catherine Stetson, to be equally divided, share and share alike."

Held, that the children and grandchildren of William Whipple Brown, together with Charlotte Gilman and Catherine Stetson, together took a vested remainder in the residuary estate at death of testatrix, subject to the limited equitable life estate.

Held, further, that a grandchild who deceased after death of testatrix, being entitled to a vested estate in remainder, her interest in the real estate descended to her heirs and in the personal property, to her husband, unless disposed of by her will.

Held, further, that the children and grandchildren took per capita with Charlotte Gilman and Catherine Stetson and with each other.

(10) *Wills. Conditions.*

Testamentary provisions:—"Within two months of my death I wish personal property sold to give B. \$1,000:" Then followed a provision for the use of a house as a home for her husband. "If B. should be in my employ and wish to continue he is to be retained at \$40 each month and his room and board, his work to be to take care of the house and give some attention to (her husband). Should B. not be satisfied after giving it a fair trial he is to receive on leaving \$500 with his wages, but should he remain with (husband) during his life, he is then to have \$2,000 for his faithful services to us both."

In another part of the will testatrix made provision for her husband in the event that he was not able to live in the house, with no provision for B. The husband never used the house.

Held, that the clause relative to B.'s wages was not intended as a gratuity, but as a provision for the support of the husband in a contingency which had not occurred.

Held, further, that B. was not entitled to the sum of \$500 since circumstances did not allow him to "give it a fair trial" and the legacy of \$2,000 was conditioned on B.'s remaining with the husband during his life which could not happen.

(11) *Wills. Conditions.*

Where a gift by will is made on an express condition precedent, which becomes impossible of performance (and the existence of impossibility is unknown to the testator), the gift cannot vest.

(12) *Wills. Survivorship.*

Testamentary bequest:—"At the death of my said husband, I bequeath all the rest of my said trust estate—Out of which (the general trust fund) are first to be taken the following bequests, if all the parties are then living, if

not their portion is to be retained in the general fund, until the so-called trust estate is fully closed.'” “To B. \$2,000.”

Held, that B. was entitled to the legacy only if he survived the husband, the meaning of the clause being that the gift was not to be paid to his personal representatives, but retained in the general fund.

BILL IN EQUITY. Certified under Gen. Laws, 1909, cap. 289, § 35.

PARKHURST, J. This is a suit in equity wherein the bill is filed by the executors and trustees under the will of Julia P. A. Anthony, for instructions on certain questions arising under the will and involving the construction thereof; the case has been certified to this court, for its determination under cap. 289, § 35, Gen. Laws, 1909, being ready for hearing for final decree.

The will of Julia P. A. Anthony is entirely in her own handwriting, and consists of sixteen pages clearly and neatly written on ordinary legal cap paper. It consists of three clauses, of which the “First” relates solely to directions, as to her burial and that of her husband, to headstones, &c.; the “Second” clause contains directions as to the erection of a certain monument, and the payment of funeral expenses; all these provisions are clear and undisputed.

The “Third” clause of the will under which all disputed questions arise covers the remaining fifteen pages of the will, is all in one paragraph, contains many provisions which are somewhat confusing and, at first sight, contradictory, and inconsistent with each other. It would seem, from the fact that the testatrix uses much legal phraseology, that she must have had before her one or more wills from which she copied such phrases, but it is evident from the general consideration of the whole will that she was not familiar with the meaning of technical legal terms, and did not intend to use them in their precise technical sense.

This “Third” clause opens with a bequest to Swan Point Cemetery Corporation, of \$2,000 in trust to use income for perpetual care of certain lots, &c., then follow directions for

the sale of enough personal property (within two months after her death) to pay certain specific legacies of money, \$1,000 each to six named persons; \$500 each to six others; \$250 each to two others if living; the will then proceeds as follows, all the words in italics being underlined by the testatrix in the will itself: "The balance and rest, of all my property, real and personal, I give to my dear husband, Frederick E. Anthony, for his personal use, during his natural life, with the exception of some personal properties like jewelry, ornaments or dishes, of which I may make especial provision. Within a week or ten days, after my death, I wish my present residence, 185 Adelaide Avenue, to be put in proper condition, as to convenience and safety, so it can be used as a home for my husband, during the balance of his life, or as long as the executors may feel it wise to continue to have him remain in it, with proper care and attention. One of his peculiarities has been, that however much he might desire to do something, when the time came, he felt he could not then do it, so gentle force may have to be used, to get him to go into the house, but have him if possible understand, it is my wish for him to go there. I would like Mrs. Ora L. Bell to take the position as housekeeper, and companion, at a monthly salary to be decided by the Executors and herself, she to have an assistant to do the cooking, washing, ironing, and perhaps extra help at certain times. If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board. His work to be to take care of the house inside and out, as he has been accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times. Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is to then have two thousand (2,000) dollars, for his faithful services to us both. Mr. Anthony, I desire to have, two attendants, a day, and night one, or still another, if necessary for his comfort. If the *executors think it wise*, I want a

reliable doctor to see him once a month, or oftener if necessary. A carriage is to be hired for his use, every suitable day, for a drive of an hour or longer, as he may desire. I want it made possible for him to end his days, in his own home, and wish Mrs. Bell and attendants to keep him interested with games, and card playing if possible. His own income is first to be used for his support, and expenses, and after that the income I leave is for his use, outside of what I have bequeathed to a few persons. Should his own income, and that which I bequeath to him, not be sufficient to give him what he actually needs for himself, attendants and, certain luxuries, his own personal property should first be drawn upon, and if that is used up, the executors are requested to draw what is necessary from the principal of my estate. What I want is to have my husband made as comfortable as possible, with his own property, and all I leave behind me, which I bequeath for his personal use during his natural life. After my death, all the property, I possessed, or am in any way entitled, at such time, shall hereinafter be called, my said Trust Estate, and shall be held in trust, during the natural life, of my husband, Frederick Eugene Anthony, to be managed in the following manner, in connection with what I have previously written. All income, exceeding, what is necessary for taxes, repairs, incidental expenses, and salary of the Trustees, to be credited to my estate, but to be used freely for the benefit of my said husband, *whenever his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any cause, but always, his own rightful income, is first to be expended, upon him, and then when necessary, falling back, upon the income accruing from my Trust Estate. I hereby now appoint the following parties, as my Executors, and Trustees of this my last Will and Testament namely: My cousin, George A. Perry, of Galesburg, Illinois; Mrs. Ora L. Bell, of Providence, State of Rhode Island, and my husband's nephew, William Richmond Tillinghast, also of said city and state, as joint tenants in trust, for them, and the sur-

vivors of them, and other the trustees, under these trusts for any time being, all hereinafter called my said trustees, to take charge of, and manage the same. I also give the said George A. Perry, if he feels the position of Trustee, would conflict with other interests, and duties, of his own, *power* to place some one in *this position*, who would consider the Trusteeship, the same as George A. Perry will, if he accepts personally the position. The real estate must be kept in good tenantable repair, and the buildings thereon, for the time being, properly insured against loss by fire, and the personal estate kept invested either in the investments in which the same may be, at the time of my death, without being accountable for any resulting loss in so doing, or from time to time, to change the investments, or any reinvestments, of the same, as my said Trustees, shall deem best; and with power to my said Trustees at any time, or from time to time to build, or make other improvements, additions, or betterments, upon any part, or parts of the real estate in their discretion, but if this is done, it must be done by changes, not affecting the *income* from my estate, to be kept intact for the benefit of my said Husband; and also at any time, or from time to time for any of these purposes, or other purposes of the trusts of these presents, or for the payment of the foregoing legacies, or any or either of them, if they shall deem it wiser, so to do, than to sell the personal estate, therefor or for the purposes of reinvestment, to sell, mortgage, or pledge any of my said trust real estate (except my Mathewson Street Estate now leased for a long term of years, to the Lederer Realty Company, also my estate, cor. of Fountain and West Exchange streets, now leased to Mr. Isaac Hahn for a long term of years, unless all the reinvestments are to be for the direct benefit of my Husband, and if these should not prove sufficient, to assist in carrying out my wishes, he is to have the full benefit of the principal arising from the sale of any of my estate, real or personal), or any of said trust personal estate, and to enter into any contract in respect thereof. With power also at any time or

from time to time (providing all Trustees agree in writing) to lease any part or parts of the real estate, for fifteen years, or less, with the understanding that if the time comes to close the Trust, the Lessee, or Lessees, shall have one year to make other arrangements, before moving out of, or from location, if sold, and passed into other hands. And my said trustees shall receive, and collect all of the income of all my said trust estate, and shall pay therefrom all taxes, assessments, and other public rates, and charges, all expenses of insurance, and of ordinary repairs, and other expenses upon, or in respect of, or incident to my said estate, and the care thereof, and the execution of these trusts including their own reasonable compensation, and the *residue* of said income, before mentioned, and hereinafter called the said 'net income,' shall until the conveyance, and transfer to my said Husband of parts, of said trust estate, as hereinafter authorized from time to time apply as follows, viz: First, to pay over to my said husband, for his own use, if he be able to care for, and use the same himself, otherwise to apply to his comfortable support and maintenance, in his own home, if possible, and if there is the slightest objection to his living in the house, now numbered 183 & 185 Adelaide Avenue, from any person or persons, the executors are to select three disinterested physicians, to examine into and decide the matter, with the understanding that proper care, and precautions are to be taken for the safety and comfort of my said Husband. If, however, he has to live elsewhere, he is to have the same use of the income mentioned, and for travelling expenses, if able to travel, with a competent and agreeable companion, and with suitable servants, to attend to him, and to properly care for his wants, at all times, an amount while received by him, equal at least to the net income, derived from my Adie Mansion Estate, and The Anthony Annex, on Westminster and Greene Streets, from my estate on Fountain and West Exchange Streets, now leased to Mr. Isaac Hahn, also my estate *between* Washington and Fountain Streets, on Mathewson & Clemence Streets,

now leased to The Lederer Realty Company, also all my property on Atwells Avenue, between Adie and Merrill Streets, and whatever benefit may accrue from the sale of the lots on Academy Avenue, on the Adie Anthony Park plat, and any other real estate now standing in my name, which I may not now have mentioned; also from *all* the *stocks* now standing in my name, as follows: United Traction, Boston and Albany Railroad Stock, Boston and Providence Railroad stock, Narragansett Electric Light Co., and others, which I hold, at the time of my death. Secondly: During the life of my said husband to pay to my cousin Henrietta W. Brown, during her life, an annuity of three hundred dollars, to be paid quarterly, from the date of my death. And all of the residue of said net income, to pay to my husband, for his own use, if he be able to care for, and use the same, if not, as I have said before, deposit it in the name of my trust estate, to be used for any necessity, or *luxury*, which may be for his comfort; And if at any time, the said net income of my said trust estate, shall not be sufficient for these purposes, or if the income aforesaid set apart for my said husband, shall not be sufficient for his uses as aforesaid, *when added to his income from his late Father's estate*, then the deficiency thereof may, from time to time, be raised by sale, mortgage, or pledge of any part, or parts of my said trust estate personal or real, except the Mathewson Street estate, the estate corner Fountain, and West Exchange streets (they being already leased, at this time), for the direct benefit of my said husband. Provided, and I declare that it shall be lawful for my said trustees at any time, if in their, or his opinion, the health, and condition of my said husband will justify it, to convey, transfer and make over to him, in fee simple, for his own use, discharged of all trusts, the one fourth part of the several stocks (the income from all my stocks, having been set apart for him, in case he was not in condition to look after his own property), and also my said Estate, corner of Fountain and West Exchange Streets, with any improvements, that may then be thereon, subject

however to any then existing lease thereof, but any other then existing incumbrance thereon, if any, to be in that event, paid out of my other estate, or if said stocks, or any of them, or said estate has theretofore been sold, then to pay to my said husband, from any other said estate, other than my said Adie Mansion, and the Anthony Annex estate, an amount equivalent, to the reinvested proceeds derived therefrom; As my husband's income from his Father Anthony's estate, is so connected with what he is to receive from mine, it may be necessary for the two disinterested Trustees, to inquire, the reason if my husband's income from his Father's estate, should be less, from time to time, as for some time, it has averaged two thousands of dollars per annum from the real estate. Should it be necessary for my Husband to continue to live at the Butler Hospital, I desire that my Trustees, will be sure that he has very comfortable rooms and accommodations, as good as the Hospital affords, and a carriage sent every suitable day for him to drive out, if he is willing, or desires to go. I also desire that one of the Trustees shall see him every month personally, and find out if possible, if he desires anything for himself, or anything done for him."

There follow very explicit directions for the care of Frederick E. Anthony in Butler Hospital if he continues to stay there, and various legacies and bequests to take effect after her husband's death, with specific gifts to William R. Tillinghast and various other relatives of Frederick E. Anthony. Also directions as to the care and sale of her property after his death.

The residuary gift is as follows: "Whatever may now be left of the so-called trust estate, I bequeath to the children, and grandchildren, of Maria and William Whipple Brown of Providence, State of Rhode Island, and Charlotte Perkins Gilman, and daughter Catherine Stetson, to be equally divided, share and share alike."

The will ends with the appointment of the executors, George A. Perry, Ora L. Bell and William Richmond Tilling-

hast. Various provisions of the will other than above which throw light on the construction of the residuary gift and of the gifts to Baynes will be referred to hereafter.

The evidence shows that Julia P. A. Anthony executed her will in 1905, and died in Providence, October 6, 1907. In 1905 Frederick E. Anthony was sixty-five years old and Mrs. Anthony about the same age,—he had then been an inmate of Butler Hospital nine years. The will shows that the testatrix knew of his condition, which was one of mental impairment, consisting of apathy, resistiveness and slight delusion. And she contemplated the possibility of his being obliged to remain at the Hospital indefinitely.

She expressed in her will, however, a desire that, upon her death, her husband move to her Adelaide Avenue residence, if possible, the question of the advisability of his so doing to be determined upon the advice of three disinterested physicians selected by the executors. (the will above quoted.) The executors selected three such physicians, who were unanimously of the opinion that it would be most unwise for Mr. Anthony to move from the Hospital. Accordingly, since 1896, Mr. Anthony has remained continually at the Hospital, where he is gradually growing worse. His condition is described as terminal dementia, with a decline of feeling, amounting to apathy; he has not the power of application to do anything, cannot be diverted, talks only in monosyllables, and does not even ask for food. His affairs are in the hands of his nephew, Charles F. Tillinghast, a brother of William R. Tillinghast. As the three experts consulted by the executors, and the assistant superintendent of Butler Hospital are all strongly of the opinion that Mr. Anthony will be better off at that Hospital than anywhere else, it seems certain that Mr. Anthony will never leave the Hospital. He was seventy years old October 18, 1910.

It also seems certain that Mr. Anthony never has been able since 1896 to take care either of himself or of his property, and that he is absolutely unfitted to take care of property or

the income thereof, or to spend it for his own maintenance and support.

This appears clearly in the testimony of Dr. Hall, the assistant superintendent of Butler Hospital, who has been conversant with the condition of Mr. Anthony ever since 1898.

Mrs. Anthony owned a large amount of property, both real and personal, that she managed herself, and after her husband was sent to Butler Hospital in 1896 she managed his property under a broad power of attorney. Up to the year 1902 she merely received his net income from the trustees of his father's estate. In 1902 the personal property of the Henry Anthony estate was divided and Mr. Anthony's share delivered to Mrs. Anthony. After that time she invested and reinvested this personal estate, keeping a strict account of both principal and income. It is to be noted in this connection that her account books show that Mrs. Anthony spent her husband's own income solely for his support and comfort, never using any of it for her own support and maintenance. The only money of his that she used was money which she borrowed, using the same for making improvements upon her own real estate; and at the time of her death she owed her husband \$10,348.83, for which she had made out her note. This represented principal and accumulated income of his estate borrowed by her from time to time. It is in evidence also, that she was careful to keep his expenses within his own income, and objected to paying Butler Hospital more than \$50 per week for his care, on the ground that that was all his estate could afford to pay. At that time she asked William R. Tillinghast whether the trustees of the estate of Henry Anthony could contribute to her husband's support out of the principal of the trust estate, and was disappointed because the principal could not be used. Before the death of the testatrix, Mr. Anthony had no private nurse, and paid the Hospital fifty dollars a week. This arrangement continued for nearly three years after her death. In 1910 he was moved to a better suite, and has

since had a special nurse. The change was necessitated by Mr. Anthony's more enfeebled condition. Since 1910 the Hospital has charged Mr. Anthony one hundred dollars a week, but his other expenses are nominal, being only for clothing, carriage hire and the few such other comforts which he is able to enjoy. The entire cost of supporting him as comfortably as possible is about six thousand dollars a year. The net income of Mrs. Anthony in recent years was about twelve thousand dollars per year, and Mr. Anthony's own annual net income, outside whatever he is entitled to under the will in question, has been since 1896 approximately thirty-eight hundred dollars. Consequently an annual surplus income of about \$8,800 is being accumulated.

It appears from the bill and answers that the children of Maria and William Whipple Brown, all first cousins of testatrix, living at the death of the testatrix were as follows: Elizabeth Whipple Brown, Henrietta Whitman Brown, Julia Adie Jastram, Maria Perkins Brown, Robert Perkins Brown, and Almira Adie Elder. At that time two of the children of Maria and William Whipple Brown had died, namely, Edward Whipple Brown and Reginald C. Brown. Edward Whipple Brown was not married.

The grandchildren of Maria and William Whipple Brown, living at the death of the testatrix were Bessie V. Polleys, Ethel Abbe, May Field Brown and Gertrude Perkins Brown, all children of said Reginald C. Brown, deceased; Edward Perkins Jastram and Julia Adie Whittaker, children of said Julia Adie Jastram; Madelaine Ray Brown and Robert Perkins Brown, Jr., children of said Robert Perkins Brown; and Marion Perkins Elder, Christine Pearce Elder and Majorie Powell Elder, children of said Almira Adie Elder.

Since the death of the testatrix, Bessie V. Polleys has died, leaving surviving her, her husband, William V. Polleys, and two minor children, namely, William Polleys and Elizabeth Polleys.

No other children or grandchildren of Maria and William Whipple Brown have died, and none have been born since

the death of the testatrix. Both Maria and William Whipple Brown are dead; Charlotte Perkins Gilman and Katherine Stetson are both alive. At the death of the testatrix there were living seventeen children and grandchildren of Maria and William Whipple Brown, and also Charlotte Perkins Gilman and Catherine Stetson.

The executors and trustees under the will, in their prayers for instructions, submit the following questions to the court:

1. Whether the whole net income of said trust estate belongs to the said Frederick E. Anthony, or only so much thereof as shall be needed for his support and comfort?

2. Whether, if the whole net income does not belong to the said Frederick E. Anthony, the surplus income shall be accumulated during his life to be paid over with the principal to those entitled upon his death to said principal, or can be divided and paid over from time to time during the life of said Frederick, and if it may be so paid, to whom it may be so paid and in what proportions?

3. Whether the children and grandchildren of William Whipple Brown living at the time of the decease of said testatrix took vested or contingent interests under her said will and if any of them are in any way entitled to any part of the income of the trust estate, to whom will the share or income be payable in case of the death of any one of them during the life of the said Frederick E. Anthony?

4. Whether Matthew Baynes is entitled under the circumstances to the monthly wages named in the will since July 1st, 1908, together with any payments in lieu of his board and lodging; and whether he is entitled either to the legacy of two thousand dollars payable to him in case he remained in the service of Frederick E. Anthony during his life, and if entitled, at what time he is entitled thereto; and if he is not entitled to said legacy whether he is now entitled to the legacy of five hundred dollars to be paid to him in case he left the employment of Frederick E. Anthony; and whether the two legacies of two thousand dollars each to the said Baynes, one named in the early part of the will

conditional upon his remaining in the services of said Frederick during his life, and the other toward the end of the will as payable on the death of said Frederick are both to be paid, or whether they are intended to be or are in legal contemplation one and the same legacy; and whether either or both of said legacies are payable only upon condition that said Baynes survives the said Frederick?

- (1) In answering these questions, this court will follow the same general principles so often followed in previous cases, in construing the provisions of wills, viz.—that the intent of the testatrix must be gathered from the whole will; *Frelinghuysen v. N. Y. Life Ins. & Trust Co.* 31 R. I. 150, 157, and cases cited; and that we will also consider the circumstances under which the testatrix wrote her will, in order to ascertain her intention, “so as to look at it, as far as possible, from the testator’s point of view,” as was said in *Boardman, Petitioner*, 16 R. I. 131, 145. See, also, *Smith v. Bell*, 6 Pet. (U. S.) 68; 30 Am. & Eng. Enc. of Law, 666, 667.

- (2) Now, while it might appear upon the face of the will as above quoted, that it was Mrs. Anthony’s intention to give to her husband a legal life estate, in the entire residuary property, real and personal, after the payments provided for under the previous provisions of the will had been made, and her language in the first instance is appropriate for the creation of such a legal life estate, it is only necessary to read the subsequent provisions to become convinced, that she did not so intend, but that, as a matter of fact, knowing, as she did for many years prior to her death, his total mental incapacity for the management of his own estate, which she herself had managed for him for about eleven years prior to her death, the whole scheme of her will was based upon the establishment of a trust estate whereby the legal estate in her property was to be vested in the three trustees named, so that in no event would he be entitled to a legal estate in her property, but only to an equitable interest, except in the event of his restoration to such an extent as to have property turned over to him by the trustees, an event which never

happened, and which in the natural course of things cannot happen. The whole frame of the will in its "Third" clause is consistent only with an intention which is quite clear to vest her estate in trustees, and to give to her husband only an equitable interest in the income. It is equally manifest, that while her first language above quoted shows an intent to give him a life estate in the whole income of her property, the subsequent provisions show that it was clearly her intention that the income from his own estate should be used up for his support and maintenance, and that only such portion of her estate should be used, after his own resources (3) were exhausted, as became necessary to furnish him with the support and comforts and luxuries appropriate and necessary for him in his condition, whether it was found expedient and proper for him to live in her residence on Adelaide Avenue, or to travel, or to remain in the Butler Hospital. The minute and detailed provisions and directions to the trustees for his support in any event, whether at her house, or at the hospital, or while travelling, above quoted, are entirely inconsistent with any intention on her part, that her entire income should be turned over to him, or be accumulated in the hands of his guardian, or of her trustees, for his benefit, or that any portion of the income of her estate should be used for him until after the resources of his own estate were first applied. The constant repetition by her, in various words, in the same paragraph of the will whereby she provides for his support, no less than three or four times, saying explicitly in one place, "His own income is first to be used for his support, and expenses, and after that the income I leave is for his use," coupled with the explicit direction to the trustees that all net income is to be credited to her estate, "but to be used freely for the benefit of my said husband, *whenever his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any cause, but always, his own rightful income, is first to be expended, upon him, and then when necessary, falling back, upon the income accruing from my trust estate," shows most con-

clusively that she intended him to have only such limited use of her income after the exhaustion of his own, and that all remaining net income not so used for his benefit should remain in the hands of her trustees for the benefit of her own estate, to be used in carrying out the subsequent provisions of her will. And it is to be noted that this construction of her intention from the plain terms of the will is entirely consistent with the facts clearly established that she always, during her lifetime, provided for his support out of his own property, and never used any of her own income for his support, so long as she lived.

- (4) The mere fact that the testatrix, in the opening sentence of the portion of the will above quoted, used words which, in their technical meaning would be sufficient to create a legal life estate in her husband, will not be allowed to override the plain intent and meaning of the provisions taken as a whole, so as to prevent the creation of the trust estate, or to nullify the other provisions of the will relating to the disposition of the income by the trustees. Where the context or other parts of a will indicate that technical words
- (5) are not used in their ordinary technical meaning, they will be interpreted by the court in the sense intended by the testatrix. See, *Ross v. Nettleton*, 24 R. I. 124; *Cook v. First Universalist Church*, 23 R. I. 62; *Gallagher v. R. I. Hospital Trust Co.*, 22 R. I. 141; *Bailey v. Brown*, 19 R. I. 669; *Homer v. Shelton*, 2 Metc. (Mass.) 194, 198; 1 Redf. Wills, 3d ed. 409.

In answer to the first question above quoted, we are therefore of the opinion that the whole net income of said trust estate does not belong to said Frederick E. Anthony, but only so much thereof as shall be needed for his support and comfort, after the income from his own property has been used.

Other courts have construed similar wills in the manner herein adopted, holding that where a testator in one part of will gives a particular estate and in subsequent passages shows that he means the legatee to take a lesser interest

only, the prior gift is restricted accordingly. Such subsequent provisions will not take from an estate given qualities that the law regards as inseparable from it, but they are operative to define the interest given. The fact that there is no limitation over is immaterial.

A case somewhat similar to that at bar is *Bundy v. Bundy*, 38 N. Y. 410. There a will provided: "I give and devise unto my wife, Clarissa M. Bundy, and Ellen R. Bundy, . . . all my real and personal estate, property, assets and effects, subject to my debts. I also further will and direct, that in case either the said Clarissa M. should die without heirs, or that the said Ellen R. should die without heirs, that the proceeds invested for either so dying, after sale of my said property, should be equally distributed among the heirs-at-law of my mother.

"And I further will and direct, that my executors, hereinafter to be named, sell and convey my real estate, and convert my personal property into cash; also that the said executors invest the proceeds of the sale of both my real and personal property, in bond and mortgage, or other good securities. I also will and direct, that the said Clarissa M. and the said Ellen R. use respectively so much, or enjoy the use of so much, of the interest arising out of the said bonds and mortgages, or said other securities, or both, as shall be necessary and proper for their maintenance and support; and that, if the interest be not sufficient for such maintenance and support, then they, or either of them, shall receive funds for such support from the principal so invested."

The court held that Clarissa was entitled only to an amount sufficient to support her during life.

In re Shower's Estate, 211 Pa. St. 297, a will provided: "After the death of my wife, Elizabeth, I direct all my estate then remaining to be divided equally between all my children, share and share alike; the trustee or trustees appointed as before provided to receive in trust for my son Frederick and daughters Sarah and Clara before named the share to which

each may be entitled respectively" and then this was made subject to certain restrictions. The court held that the children were entitled only to equitable life estates subject to the restrictions, and said (pp. 302, 303): "It is settled by our cases that an estate of inheritance in real estate or an absolute interest in personalty given in a will may be reduced to a lesser estate if the subsequent language of the instrument unequivocally shows that such was the intention of the testator. 'No principle is better settled,' says Strong, J., in *Sheets' Estate*, 52 Pa. 257, 'than that, if a testator in one part of his will give to a person an estate of inheritance of land, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only, the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and so show that what without them might be a fee, was intended to be a lesser right.' This language is quoted with approval in *Snyder's Appeal*, 95 Pa. 174; *Good v. Fichthorn*, 144 Pa. 287, and *Krebs' Estate*, 184 Pa. 222. . . . Nor is the fact that there is no limitation over of the principal sufficient to control the quantum of the estate in the *cestuis que trust*.

Haring v. Shelton, 114 S. W. 389 (Tex. 1908). Here a will provided: "I give and devise unto my beloved wife, C. C. Shelton, her heirs and assigns forever, the following described tracts or parcels of land . . . and it is my will that my said wife, C. C. Shelton, and her heirs shall hold said lands in fee simple forever, or so long as she shall remain a widow." Although there was no gift over, the court held that the heirs of the testator could recover the land from C. C. Shelton's grantee, and said (p. 391): "Here the limitation of the estate to the widowhood of Mrs. Shelton is contained in the very terms of the devise and the intention of the testator is unmistakable. It is conceivable that the

testator, having it in mind to limit the estate devised to his wife to her widowhood, may have used the language importing, taken by itself, an intention to make an absolute gift, without clearly understanding the import of such language, as repugnant to the limitation; but it is not reasonably conceivable that he would have used, in this very connection, the language 'or so long as she shall remain a widow,' without having the specific intention to vest an estate determinable upon his widow contracting a second marriage. It is true there is no devise over, but that does not destroy the limitation, but leaves the remainder to descend as in case of intestacy. It being clear that the testator did not use the words, 'so long as she shall remain a widow,' without a full understanding of their import, and that they express his intention, we do not think that intention should be defeated by the application of any technical rules of construction."

Dulin v. Moore, 96 Tex. 135 (1902). In a will were the following clauses:

"Item 2d. To the children of my son, A. B. Moore, he being dead, I give and devise" certain real estate. . . .

"Item 9th. I hereby appoint R. R. Dulin of Sherman, Texas, trustee to receive and control the property bequeathed and devised to the children of A. B. Moore. . . .

"Item 10th. I hereby direct and empower the said trustees to keep possession and control of the property bequeathed and devised to their said beneficiaries during the lives of said beneficiaries. Said trustees are not authorized to dispose of any of the body of said property, but are expressly prohibited from so doing, except for the purpose of reinvesting, which last they may do at their discretion. Said trustees are authorized and empowered and directed to expend the rents, interests and profits arising from said property in furnishing the said beneficiaries with necessaries and such other things as may be suitable for the respective beneficiaries, according to their stations in life."

On a suit to construe the will, the court held that Items 9th and 10th ought not to be rejected as repugnant to Item

2d, but with them operated to give the legal estate to the trustee and that Moore's children took only a beneficial interest. The court said (pp. 138, 139): "In this case we must construe clauses 2 and 7 of the will in question in connection with clauses 9 and 10. The language of the two former, if unaffected by the latter two, would by virtue of the operation of our statute have conveyed to the devisees therein a fee simple title to the property. . . . The intention of the testatrix must be given effect, unless prohibited by law. That the provisions in clause 10 do not contravene any rule of law we think clear."

See, also, *Taggart v. Murray*, 53 N. Y. 233 (1873); *In re Boulevard from Second St. to Rhawn St.*, 79 Atl. 716 (Pa. 1911).

- (6) As to the second question above set forth, whether the surplus income shall be accumulated during Mr. Anthony's life to be paid over with the principal to those entitled upon his death, &c., we are of the opinion that it is the plain intent and meaning of the will that the trustees shall accumulate the income, over and above such portion thereof as may be properly expended for Mr. Anthony's support in accordance with our opinion already expressed; and that such accumulated income becomes a part of the Trust Estate in their hands to be distributed in accordance with the subsequent provisions of the will.

Counsel for Mr. Anthony contend that "there nowhere appears any direct reference to any surplus of income and there is no direction for the accumulation of the surplus for the benefit of the remaindermen," and that there is no ground for implying such a direction. It is true that nowhere has the testatrix used the word "accumulate" or "accumulation." But she gave the following directions: "All income, exceeding what is necessary for taxes, repairs, incidental expenses, and salary of the Trustees to be credited to my estate, but to be used freely for the benefit of my said Husband, *whenever his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any

cause, but always, his own rightful income, is first to be expended, upon him, and then when necessary falling back, upon the income accruing from my Trust Estate." It is our opinion that this direction to "credit" the income to her estate amounts to a direction to accumulate it, and the testatrix, by providing that the trustees may "fall back" upon it shows an intention to treat the surplus income accruing as principal. The same idea is expressed in the following direction to "deposit" the income: "And all of the residue of the net income, to pay to my husband, for his own use, if he be able to care for, and use the same, if not, as I have said before, deposit it in the name of my trust estate, to be used for any necessity, or *luxury*, which may be for his comfort." It may be that the vocabulary of the testatrix did not contain the technical term "accumulate," and so to express her desire to convert the income into capital she used the words which her business experience rendered familiar to her, "credit" and "deposit." And that the accumulation was to be for the benefit of the residuary legatees is made clear by the residuary clause which disposes of "whatever may now be left of the so-called Trust Estate," previous provisions having carefully defined the "so called Trust Estate" and directed that the income accruing from it should be made a part of it.

The authorities treat such expressions as directions to accumulate. The law is summarized in 22 Am. & Eng. Ency. of Law, 2nd Ed. 728: "In any case where it is made the duty of the trustee to treat as principal the income of the trust property, instead of distributing it in the ordinary course, there is an accumulation."

In *Matter of Estate of Fisher*, 4 Misc. (N. Y.) 46, a will directed the trustee under it to pay off a mortgage from the income of the estate. The court held that this in effect directed an accumulation (which was void under a statute) and said of the income (p. 47): "It goes into and forms part of such estate and increases the capital, the income of which is distributable under the trusts in the will, and the augmented

principal ultimately. The provision is, in effect, precisely the same as if the testator had, in so many words, required the trustee to apply the income to swell the principal of the trust fund."

- (7) But no such express direction is necessary. If a part of the income of a trust estate is undisposed of, the trustees should, even in the absence of any provision whatsoever, accumulate it and pay it to the legatees entitled to the original corpus of the estate.

In 22 Am. & Eng. Ency. of Law, 2nd Ed. 729, it is said: "A direction to accumulate need not be express; it may be implied from the terms of a will or deed, as where the instrument disposes of an estate in such a manner that an excess above what is reasonably necessary to carry out the trust necessarily accumulates."

Such was the holding in *Eberly's Appeal*, 110 Pa. St. 95, in which the court (p. 98) used language almost identical with the above. The following are among other cases which recognize and apply this principle: *M'Donald v. Bryce*, 2 Keen, 276, *Penrose's Appeal*, 102 Pa. St. 448, *Scott v. West*, 63 Wis. 529 (see pp. 573, 574).

- (8) As to the second branch of the second question submitted to us, whether such surplus income can be divided and paid over from time to time during the life of Mr. Anthony and if so, to whom and in what proportions, we are of the opinion that the case is not such as to warrant this court in making any order for such payment. While it appears from the evidence that in all probability the principal of the trust estate will be amply sufficient to pay the very numerous pecuniary legacies, payable after Mr. Anthony's death, some thirty-seven in number, and amounting in the aggregate to the sum of upwards of \$50,000, without its being necessary to resort to the accumulated income of the estate, nevertheless, as very large portions of both real and personal estate are specifically devised, and bequeathed, and other portions of real and personal estate will have to be sold to raise the necessary funds, and it cannot now be known what

will be realized from such sales, it cannot at present be accurately determined whether there is sufficient property to carry out all of the provisions of the will and still leave the accumulated income intact. It is further to be noted that the testatrix in making these numerous bequests divides them into several classes, and constantly provides for abatement in case there is not enough remaining to pay them all. No case is cited on behalf of the children and grandchildren of Maria and William Whipple Brown, for whose benefit and to whom such distribution is urged, which is like the case at bar, or in which there are so many bequests to be provided for. The case of *Barstow v. Thomas*, 20 R. I. 561, is not directly in point, as in that case, the time for the distribution of the estate subject to an annuity and certain expenses, expressly provided for in the will, had arrived, and the question of anticipated distribution was not involved; and the real question was as to the amount of property which should be retained by the trustee to provide for the annuity and expenses. In the case of *Harbin v. Masterman* (1896), 1 Ch. 351, which was a case of anticipated distribution, there were several annuities charged upon the estate, but all of the annuitants except one consented to the distribution, and it was clearly shown that the annuity of the one objecting was amply secured by a deposit of government stock or consols; and it further appears in the report of the case that this ostensibly objecting annuitant was not actually objecting in good faith, but had allowed her counsel to use her name for ulterior purposes of his own, for which he was severely reprimanded by the court, and ordered to pay costs. The other cases cited to this point have no more bearing upon the case at bar than the two last above referred to.

For the reasons above given we do not find in the present case any reason for ordering any distribution of the accumulated income prior to Mr. Anthony's decease.

- (9) As to the third question, whether the children and grandchildren of William Whipple Brown living at the time of the decease of said testatrix took vested or contingent interests

under her said will and if any of them are in any way entitled to any part of the income of the trust estate, to whom will the share or income be payable in the case of the death of any one of them during the life of the said Frederick E. Anthony, we are clearly of the opinion that the said children and grandchildren, together with Charlotte Perkins Gilman and Catherine Stetson, who are specifically named hereinbefore, together took a vested remainder in the residuary estate, at the death of the testatrix, subject to the limited equitable life estate of the said Frederick E. Anthony, as above set forth; that Bessie V. Polleys who has since died, became entitled to a vested estate in remainder the same as the others, and that her interest was descendible and transmissible to her heirs, so far as it is an interest in real estate, and to her husband as to such portion of the residuary estate, as consists of personal property (unless she has disposed of her interests by will).

The rule laid down by this court in *Greene v. Rathbun*, 32 R. I. 145, 156-7, is entirely applicable to the question now under discussion, both as to the vested interests of the said children and grandchildren, and of said Charlotte Perkins Gilman and Catherine Stetson; and also as to the interests of said Bessie V. Polleys and her husband and children.

It is also to be observed that the rule in *Greene v. Rathbun*, *supra*, involves the further finding that the remainder vested in these children and grandchildren, is subject to open and let in any grandchildren who may be born after the death of the testatrix, and before the death of Frederick E. Anthony, at which time the estate will vest in possession and be distributed (see p. 157). This furnishes an additional reason, if any were needed, why none of the income of the estate should be distributed during the life of Mr. Anthony, because there can be no legal certainty that other grandchildren will not be born during his life, and thereby become entitled to share in the distribution of the residuary estate.

It is also clear that, under the terms of the residuary

clause, the said children and grandchildren take *per capita* with Charlotte Perkins Gilman and Catherine Stetson and with each other. In the absence of expressions of a contrary intention, a gift to "A and the children and grandchildren of B" gives each child and grandchild a share equal to A's and to that of each other child and of each other grandchild. In *Guild v. Allen*, 28 R. I. 430, 436 (1907), Mr. Justice Johnson said: "In general, where a gift is to the children of several persons and the children of another person, they take *per capita* and not *per stirpes*." See, also, Schouler, Wills, 2d Ed. Sec. 540; 2 Jarman, Wills, 5 Amer. Ed. 756, and cases cited. Moreover, the words "to be equally divided, share and share alike," show unmistakably that this was the intention of the testatrix.

- (10) In answer to the fourth question above stated we are clearly of the opinion that Matthew Baynes is entitled to nothing more than he has already received under the will, unless he survives Frederick E. Anthony, and in that event he will be entitled only to one legacy of \$2,000. Baynes is not entitled to \$40 a month with payments in lieu of room and board during the life of Mr. Anthony. The following extracts will throw light on Baynes' rights: After the directions for burial, monument, and cemetery, the testatrix directs: "Within two months of my death, I wish enough personal property to be sold to give" (inter alia) "to Matthew Baynes," . . . "one thousand dollars (\$1,000)." . . . Then follows the gift of the residue to her husband and directions that the Adelaide Avenue house be used as a home by her husband, if possible. The testatrix provides: "I would like Mrs. Ora L. Bell to take the position as Housekeeper, and Companion, at a monthly salary to be decided by the Executors and herself, she to have an assistant to do the cooking, washing, ironing, and perhaps extra help at certain times. If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board. His work to be to take care of the house inside and out, as he has been

accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times. Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is then to have two thousand (2,000) dollars, for his faithful services to us both. Mr. Anthony, I desire to have, two attendants," and other minute directions as to how Mr. Anthony is to be cared for.

The clause in question reads: "If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board." It is inserted in the midst of minute directions for the care of Mr. Anthony, all of which rest on the condition that Mr. Anthony should be able to occupy the Adelaide Avenue house. The very work for which this is to be given to Baynes is care of this house, "inside and out, as he has been accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times." In another part of the will, the testatrix makes directions for the care of her husband in event of his not living in the Adelaide Avenue house, and in this part there is no provision whatever for Baynes. An absolute legacy of \$1,000 is given Baynes in the first part of the will, and another legacy of \$2,000 is given him in a clause near the last part of the will referred to hereafter. In the light of these circumstances, it is clear that the clause under discussion was intended not primarily as a gratuity to Baynes, but rather as a provision for the support of Mr Anthony in a contingency which has not occurred.

The executors have paid Baynes the legacy of \$1,000 provided for in the early part of the will. As Mr. Anthony could not live in the Adelaide Avenue house, the executors closed it, after giving Baynes one month's notice that they should not require his services there after July 1, 1908, and paying him his stipulated compensation of \$40 a month to that date. As the testatrix died October 6, 1907, Baynes

received in all payment for about nine months' service at the rate directed in the will. As he cannot render further services, even though it is through no fault of his own, he is obviously not entitled to any further payment. A similar question came before the court in *In re Dempsey*, 25 N. Y. Misc. 257 (1898).

There a testator made a gift to a charity, for the support and maintenance of his wife, the charity to retain any balance for its own benefit. The wife died before the testator, and the court held that as the gift was made for a service which the charity was prevented by circumstances from performing, it could not get the gift.

Baynes is not and never will be entitled to anything under the clause, "Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is then to have two thousand (2,000) dollars, for his faithful services to us both."

The testatrix evidently contemplated the possibility of Baynes' being dissatisfied with working for a person of Mr. Anthony's peculiarities, but wished to give him every incentive to stay with Mr. Anthony, and so carefully provided to reward him "for giving it a fair trial," making dissatisfaction after a fair trial a condition precedent. This contingency has not occurred—Baynes was not shown to have been dissatisfied, but circumstances did not allow him to "give it a fair trial."

The gift of \$2,000 is conditioned in unambiguous terms on Baynes' remaining with Mr. Anthony during his life, and this contingency cannot happen.

- (11) The law is well settled that where a gift by will is made on an express condition precedent, which becomes impossible of performance (and the existence of impossibility is unknown to the testator), the gift cannot vest. The cases on this point are numerous. The following are illustrative:

Priestley v. Holgate, 3 K. & J. 286 (1857). The will provided: "Whereas . . . James Priestly" "has emi-

grated to Australia, I give . . . him, in case he remains in Australia or out of this kingdom, 600 l; to be paid to him twelve months after the decease of my wife; but if he return to England before her decease, I give and bequeath to him the further sum of 400 l." Several years before the death of the widow, Priestly took passage on a boat for England, with intention of returning, but was drowned, with all on board. The court refused to allow the additional £400 to his representative.

Higgins v. Eaton, 178 Fed. 153 (1910). Here a legacy of \$100 a month was left to a sister, provided that she cared for a mute brother during his lifetime. The brother, however, lived elsewhere; and the court, saying that it was immaterial that the sister was willing to care for the mute, held that she was not entitled to the legacy.

Colvin v. Pairpont, 9 Ky. L. Rep. 191 (1887). The complainant's bill alleged that the testatrix left \$200 to him in case he should live with and care for her as he was then doing until her death; that he lived with and cared for her for several years, until she ceased to have a house and gave him no place where he could stay with her. The court sustained a demurrer to the bill.

Fisher v. Fisher, 113 N. W. 1004 (Neb. 1907). A testator contemplating his future inability to look out for himself, provided that if his son should care for and support him during the remainder of his life, he should have a certain piece of land. The son thereafter gave his father whatever care he required and rendered many personal services, but, owing to a change in circumstances, his father required him to support him financially only to a small extent. The court held that the son was not entitled to the land.

Stark v. Conde, 76 N. W. 600 (Wis. 1898). The will provided, "If at that time (when nephew attains the age of 30 years) said trustee deems my said nephew competent to care for. . . the said sum of \$10,000, . . . he shall then pay over to my said nephew . . . said sum." The nephew attained the age of thirty about a year before the

death of the testator; and the court held that as there consequently was no trustee at that time, the nephew could in no way get the legacy.

See, also, Jarman, Wills, 5 Am. Ed. 520; 1 Underhill, Wills, 648; Schouler, Wills, 2d ed. Sec. 599.

- (12) Baynes will be entitled to the legacy of \$2,000 given him in the last part of the will only if he survives Frederick E. Anthony. This legacy is one of several pecuniary legacies payable from the general trust fund after Mr. Anthony's death, the provisions of the will throwing light on it being the following: "After my husband's death, and his funeral, and all our other debts, and expenses have been paid, I give and demise certain properties as follows." (Here follow various legacies, none of them pecuniary.) Then the will continued—"At the death of my said husband, I devise and bequeath all the rest of my said trust estate . . . as follows, viz.:" (Here follow more legacies, none of them pecuniary.) There are next directions for selling certain property, "a reasonable time after the death of my husband," and immediately follow these sentences: "As to the stocks, they are to be held or sold, as executors think best, but their value added to the general Trust Fund, out of which are first to be taken the following bequests, if all the parties are then living, if not their portion is to be retained in the general fund, until the so called Trust Estate, is fully closed. The following legacies, are to be paid, in the order in which they are named; and if my estate hereinbefore set apart for this purpose, shall prove insufficient for the payment of all of them, then they shall abate in the inverse order. And if my estate proves sufficient therefor, *all* of the following legacies, to be paid free, from all legacy, or other public tax, or duty the same, if any, to be paid from my then remaining estate. First, I give to Matthew Baynes, now in my employ, two thousands of dollars, (\$2,000)" and several other pecuniary legacies. Although the testatrix expressed her idea rather clumsily, it is obvious that her meaning was "the following bequests are to be paid to those of the follow-

ing legatees then living, and if any one of them is not then living, the amount of his gift is not to be paid to his personal representative or children, but is to be retained in the general fund, and be distributed with that fund as hereinafter provided."

Having now answered all of the questions above set forth, the parties may present a decree for the approval of the court, in accordance with this opinion.

Tillinghast & Collins, for complainants.

Claude R. Branch, Edward P. Jastram, Edwards & Angell, for Robert P. Brown, *et al.*, residuary legatees.

Mumford, Huddy & Emerson (*Charles C. Mumford*, of counsel), for Frederick E. Anthony.

Thomas A. Jenckes, for respondents Polleys.

William P. Fowler, Comstock & Canning, Patrick P. Curran, John Henshaw, Livingston Ham, William W. Douglas, Hugh J. Carroll, for various other respondents.

HERMENIGILE MESSIER vs. CORDELIA C. MESSIER.

APRIL 11, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Res Adjudicata. Issues.*

Plaintiff brought a suit in equity against his mother, among other defendants, to set aside a deed from the mother and for specific performance of an alleged agreement to make a will and it was decided that the evidence did not show a contract to make a will or a contract not to revoke the will or conduct estopping her from revoking the same, and bill was dismissed. Thereafter, plaintiff brought suit against his mother, claiming compensation for services, board and expenditures, claiming that the services were rendered because of an agreement that he should be compensated by will.

Held, that the issues were not the same, and the issue in the latter suit was not res adjudicata in the equity suit.

(2) *Contracts For Work and Labor. Evidence.*

Held, further, that in the action in indebitatus assumpsit, the burden being on plaintiff to show that the services were not rendered voluntarily and gratuitously, and were not understood by defendant to be so rendered, although

the contention in the equity suit had been decided against him, declarations of defendant were properly admissible, even if they had some tendency to show a contract to make a will and an agreement not to revoke the same, for they tended to show that defendant understood that in some way plaintiff was to be compensated.

(3) *Work and Labor. Contracts.*

A man who expects to be paid for his services by a legacy cannot afterwards resort to his action for the value of such services, if only a mere expectation on his part is shown.

(4) *Appeal and Error.*

The court cannot pass upon the exclusion of a deposition, where the deposition does not appear as an exhibit and the court is not informed as to its contents.

(5) *Work and Labor. Evidence.*

In an action by a son against his mother for services, the admission of the bill of complaint and the opinion of the court thereon, in an equity case between the parties wherein the court decided that the mother did not agree to make a will in favor of the son, was not prejudicial to plaintiff, since the son could recover in the suit for services only because his contention in the equity suit was decided against him.

(6) *Work and Labor. Compensation by Will.*

Where a son gave board or services or paid out moneys for his mother with her consent with the expectation of being paid therefor by will, and the mother expected to pay for the same by will, then he can recover therefor in an action of assumpsit what is reasonable, where the mother has by conveyance of her property put it out of her power to compensate him by will.

(7) *Work and Labor. Parent and Child.*

In an action by a son against his mother for services, the amount of services rendered would affect the amount of recovery, but not the right of recovery, therefore a request to charge that a small amount of services or small amount of money expended might be considered a gift, but it might be highly improbable that a poor man would give or intend to give a large amount for many years, when other children were contributing nothing, was properly refused.

(8) *Work and Labor. Contracts.*

In an action by a son against his mother for services rendered a request to charge based solely on the expectation of compensation, was properly refused.

(9) *Work and Labor. Statute of Limitations.*

Where a son expected to receive compensation for his services by will, and his mother expected to pay him by will and allowed him to think he would be so paid, the statute of limitations did not commence to run until in some way the mother gave him notice that he would not be so paid.

(10) *Mutual Accounts. Statute of Limitations.*

In mutual accounts and dealings an obligation arises not from each item, but from and for the balance only. Hence the statute of limitations begins to run only from the date of the last item.

(11) *Mutual Accounts. Work and Labor. Statute of Limitations.*

Upon a running account between a son and his mother, based on services rendered the mother, on a promise to pay the son by will, he would have no right of action in the absence of a repudiation of the agreement, until it had been fully performed, but where it has been repudiated, by act of the mother in the conveyance of her property, the right of action upon the balance representing the debt between them, thereupon accrued and the statute of limitations began to run upon that date.

ASSUMPSIT. Heard on exceptions of both parties. Certain of exceptions of plaintiff sustained. Defendant's exceptions overruled.

JOHNSON, J. This is an action of *indebitatus assumpsit* for work and labor brought by Hermenigile Messier of Warwick, in Kent County, against his mother, Cordelia C. Messier, of said Warwick. The action was brought July 10, 1909.

There is no dispute that for several years he had collected the rents from her property and paid therefrom the charges against the property and that she made a will in his favor in 1891 which she revoked in 1907 after leaving her son's home and after going to the house of her daughter, Cordelia E. Rainville.

In 1907 a suit in equity was brought by Hermenigile Messier, this plaintiff, against his mother, the defendant, and Cordelia E. Rainville, and her husband, Stanislas Rainville, to set aside a deed from Mrs. Messier to Mrs. Rainville and a mortgage back, and for a reconveyance, and to compel specific performance of an alleged agreement to make a will, and for an injunction. In that suit (*Messier v. Rainville, et al.* 30 R. I. 161) it was decided that the evidence did not show a contract to make a will; that it did not show a contract not to revoke the will; and that it did not show conduct on the part of the respondent Messier that would estop her from revoking the same. A final decree dismissing the bill was entered in that case.

The plaintiff in this action claims compensation for services, board, and expenditures for a period extending from

January 12, 1891, to November 22, 1907. He testified that he performed these services because of an agreement that he should be compensated by will.

The defendant pleaded the general issue and also the statute of limitations. The case was tried before a justice of the Superior Court and a jury, January 25, 26 and 27, 1911.

The jury returned a verdict for the plaintiff for \$1,069.57. Both plaintiff and defendant thereupon brought their bills of exceptions to this court.

The defendant offered in evidence *inter alia* the record in the equity suit and contended in a motion to direct a verdict for the defendant that the issues sought to be decided in this case had been the subject of an adjudication in the former suit, and also that a man who expects to be made amends by a legacy cannot afterwards resort to his action. This motion was denied, and the defendant duly excepted. This is the defendant's sole exception.

In *Almy v. Daniels*, 15 R. I. 312, cited by defendant, the plaintiffs introduced in evidence the plat and papers in an equity suit between the same parties respecting the same strip of land. This court, p. 313, said: "The plaintiffs contended, at the time of the offering of said evidence, that this deed from Almy to Mead had already been judicially construed by the court in the equity suit referred to, and that the question was therefore *res adjudicata*. The defendant contended, however, that the construction put upon said deed in said case was mere *obiter dictum*. Upon a careful examination of that case, we find that the title of the plaintiffs' testator to the land in question was directly involved therein. The defendant then claimed precisely what he now claims, viz., that by this deed the plaintiffs' testator 'conveyed all his interest in the gangway or street to Mead, which by sundry mesne conveyances has come to him.'" . . . "The opinion shows that the question as to the proper construction of said deed was 'raised and fully argued in the case,' and that thereupon the court decided that this

strip of land was held by the plaintiffs' testator and the defendant as tenants in common. And although it was not strictly necessary for the court to pass upon this question, as the bill was dismissed on the ground that no contract was proved for a private way over the strip of land in dispute as alleged in the bill, yet, as the point was distinctly raised by the pleadings, fully argued by counsel, and thus deliberately passed upon by the court, we think the construction put upon the deed must be held to be *res adjudicata*."

- (1) In that case the question of title to the land in dispute had been decided in the former case and this was the very point at issue in the case then before the court. The defendant's counsel contend that the issues sought to be decided in the case at bar had been the subject of an adjudication in the former suit. In the equity suit it was decided that the evidence did not show a contract to make a will; that it did not show a contract not to revoke the will; that it did not show a conduct on the part of the respondent that would estop her from revoking the same. In the case at bar the plaintiff is not seeking to have a will, made pursuant to an alleged contract, declared irrevocable, but is suing for compensation for services and expenditures for a period extending from January 12, 1891, to November 22, 1907. The issues are not the same. It cannot be said that the issue sought to be decided in the case at bar was the subject of an adjudication by the court in the equity suit, as the issue in the case at bar was not before the court in the equity suit.

This question has quite frequently been before the courts in other jurisdictions. The case of *James v. Cummings*, 132 Mass. 78, though it does not involve an agreement for compensation by will, is in principle entirely in point on this question. The Court, Devens, J., said: "This is an action for board of Cummings and his wife, during her lifetime, and for labor and services upon his land. The land upon which the alleged service was rendered had been purchased with the money of Cummings, and the deed had been put by James in the name of his wife, who was the daughter

of Cummings. Before the date of the present suit, a bill in equity had been brought by Cummings against James and his wife, by which he sought to have the title thereto placed in his own name. To this bill James and his wife had answered that the land had been purchased by Cummings' money, but that the deed had been made to the wife of James in consideration of support which had been furnished to Cummings and his wife, and in expectation of further continued support. Upon the trial of the equity cause, it was found that Cummings never intended to have the land conveyed to the wife of James, or to deprive himself of his legal possession and enjoyment thereof; and a decree was entered that the wife of James should convey the land to Cummings, and that James should join in the deed. This decree has been complied with. At the trial of the case now before us, the court, at the request of Cummings, ruled that the decree was conclusive as to his title; that the deed was not put in the name of the wife of James by his consent; and that the land was not the land of Mrs. James burdened with a trust for his support. Cummings now objects that certain evidence was admitted tending to show that board and lodging were furnished in consideration of the deed, and that the equity case decided between the parties made such evidence inadmissible.

"Evidence which may fail to prove one proposition may be invoked to prove another, even if the first proposition is conclusively decided against the party seeking to maintain it. It was settled between these parties that the land was the property of Cummings, but declarations admitted as part of his conversation or of conversation in his presence which was otherwise relevant were properly so admitted, even if they had some tendency to show a contract different from that here declared on, and which James, in view of the equity suit, could not here claim ever to have existed. James was seeking to establish that Cummings and his wife boarded with him on the land which belonged to Cummings (although then in the name of Mrs. James), and that work and labor

were done by him on the land on a contract express or implied that the board and labor were to be paid for. This was a different inquiry from that presented by the equity suit. It was essential to the case of James that he should show that the board and services were not gratuitous, and were not understood to be so or treated as such by Cummings. Upon this issue, the conduct of Cummings and his wife, the manner in which the parties lived and worked together, and the declarations of Cummings, were all competent. Even if some of them tended to establish that the land was actually the property of Mrs. James, which had been decided against James, these were admitted as part of a conversation otherwise relevant, and further tended to show that Cummings understood that board and services were not furnished him gratuitously, but that in some form or at some time James was to be compensated therefor. It may well have been that the jury were justified in believing them to this extent, while they disregarded them, as they were instructed and were bound to do, so far as they afforded any proof that the land was actually the property of Mrs. James."

The principle involved is stated in 2 Greenl. Ev. § 104, that where the contract, though not fully performed, has been rescinded by some act on the part of the defendant, the plaintiff may resort to the common counts to recover for what he had done under the special agreement. Whether the contract has been rescinded by the act of the defendant or is one not enforceable, as within the statute of frauds, for example, the same principle applies.

In *Schempp v. Beardsley*, 83 Conn. 34, there was an oral agreement to live with and support an owner of real and personal property during her lifetime, in consideration of receiving all her property at her death. The agreement being in part for the conveyance of real estate, it was held that the plaintiffs could support no action upon it. The court, Baldwin, C. J., pp. 37, 38, said: "The contract never was repudiated by Miss Coffey during her lifetime. It could not be, so as to affect their rights without notice to

the Schempps. The execution of her will in favor of others she never made known to them; nor would its execution have prevented her from subsequently doing what her agreement with them required. No right of action, therefore, of any kind, by the Schempps against Miss Coffey existed during her lifetime. Upon her death a right of action arose, not for damages measured by the value of the estate which she had left, because no action on the special contract could be maintained, but for damages measured by the value of the support furnished." In *Ellis v. Cary*, 74 Wis. 176, the court, pp. 183-189, says: "The agreement alleged in the complaint or claim of *Mrs. Ellis*, and found by the court to have been made, is, in substance, that if *Mrs. Ellis* would keep the house of the deceased and take care of him during the residue of his life, he would devise and bequeath to her all his real and personal property as compensation for such services. The agreement was oral. When it was made, and when John Gorman died, his estate consisted of both real and personal property, but the most of it was real estate." . . . "The agreement thus established is in part for a devise of land, and the same was not evidenced by any writing signed by the testator. It is therefore within the statute of frauds, R. S. p. 654, Sec. 2304. The fact that it included personal as well as real estate does not take it out of the statute, even as to such personal estate. Such a contract is indivisible, and, failing in part, the whole fails." . . . "It is a verity in the case that the deceased expressly agreed by parol to pay *Mrs. Ellis* for her services, and that upon the faith thereof she entered upon such service, and continued therein until he died, thus fully performing her part of the agreement. Were this all, the agreement could be a valid express contract on his part to pay for such services what they were reasonably worth. But such agreement contains another provision, which renders it void as a contract. It would be a severe rule to hold that, merely because such provision was included in the parol contract, no doubt through the ignorance of both parties of the effect of it,

Mrs. Ellis should lose all compensation for eight years of most faithful service, when she stipulated in advance for such compensation and the deceased agreed in advance (no doubt in perfect good faith) to compensate her therefor. After much investigation and thought we have reached the conclusion that the case is not governed by any such harsh rule." . . . "Owing to the relationship between *Mrs. Ellis* and her step-father, and the fact that she was a member of his family, the legal presumption, in the absence of proof to the contrary, is that her services were rendered gratuitously. The burden is therefore upon her to show that they were not so rendered, but that she was to be remunerated therefor. To meet this obligation she proved the express parol agreement for compensation. True, such agreement is void as a contract for the reasons stated, and hence cannot be enforced specifically, nor constitute the basis of an action for damages. But is there any just or sound reason why the express promise or stipulation therein to remunerate her should not still be operative, not as a contract, but to rebut the presumption that *Mrs. Ellis* rendered the services in question gratuitously?

"True, this court has said in effect, in several cases, that the express promise or agreement required by the rule means a valid express contract. But in each of these cases a valid express contract was asserted and relied upon to rebut the presumption of gratuitous service. Hence, as applied to and limited by the facts of those cases, the rule thus laid down was strictly accurate. Yet it does not necessarily conflict with the rule above suggested, that the presumption of gratuitous service may be rebutted by proof of an express promise or agreement to remunerate therefor, which by reason of some provision contained in it is void as a contract. Those cases hold that where a valid express contract is relied on to rebut the legal presumption of gratuitous service, such a contract must be proved. They do not necessarily hold, and it would probably be mere *obiter* did they assume to hold, that such presumption is not also rebutted by proof

of an express promise or agreement to remunerate, which for some reason is void as a contract. There may be a promise or agreement to do a particular thing, even though it falls short of being a valid contract. An examination of the cases above referred to will show that none of them present the question of the effect of a promise to remunerate, which cannot, under the statute of frauds, be enforced as a contract." . . . "It was further contended by counsel for the defendant, in his very learned and able argument, that the parol contract to devise land for the services of *Mrs. Ellis* being void, it is an absolute nullity and cannot be considered, for any purpose whatever, as ever having had an existence. Cases are not wanting containing language which seems to support this contention. But the rule is too strongly stated. It is entirely accurate to say that a void contract cannot be enforced. No attempt is here made to enforce one; but the fact is that, in the very large class of cases in which recoveries for money paid or for services rendered under void contracts have been upheld, it was competent and essential in each case to prove the contract and its invalidity before there could be any recovery. If the void contract contains no express stipulation to repay the money or to compensate for the services, the plaintiff recovers, in a proper case, on the implied promise to do so. If there is a stipulation in the void contract to repay the money advanced on it, or, as in this case, to compensate for the services rendered on the faith of it, the recovery is upon the express promise or agreement.

"We must hold, therefore, that a person rendering services for another which would otherwise be gratuitous (as in the present case) may recover therefor on proof that they were rendered pursuant to an express promise or agreement by the one receiving the services to compensate therefor, even though such promise or agreement contains provisions which bring it within the statute of frauds and prevent its enforcement as a contract."

The same question was involved in *Wallace v. Long*, 105 Ind. 522. The circumstances were very similar to those in

Ellis v. Cary, supra. After holding that the agreement there in question was within the statute of frauds, and could neither be specifically performed nor become the foundation of an action for damages, the court says: "It does however, serve to rebut any presumption which might otherwise have obtained, that the services rendered were to have been gratuitously performed, or that they were performed under the mere expectancy that the intestate would leave the plaintiff's ward a legacy. She is therefore entitled to recover the value of her services."

(2) Although the plaintiff in the case at bar testifies that he performed the services because of an agreement that he should be compensated by will, that does not render his evidence of no effect. In this case, as was said in *James v. Cummings, supra*, evidence which had failed to prove the contention of the complainant in the equity suit could be invoked to prove his contention in his suit for services, although the contention in the equity suit had been conclusively decided against him. And the declarations of the defendant were properly admissible, even if they had some tendency to show a contract to make a will and an agreement not to revoke the same, although, in view of the equity suit, the plaintiff could not here claim that such a contract ever existed. The plaintiff was seeking here to prove that the work and labor done and the expenditures made, were so done and made upon a contract express or implied that he was to be compensated therefor. The burden was on him to show that the services were not rendered voluntarily and gratuitously, and that they were not understood by the defendant to be so rendered. Upon this issue the conduct of the defendant, the manner in which the parties lived together, and the declarations of the defendant were all competent. If some of such declarations tended to show a contract to make a will in the plaintiff's favor, these were parts of conversations otherwise relevant, and further, tended to show that the defendant understood that the services were not rendered gratuitously, but that in some way

the plaintiff was to be compensated therefor. The jury would be justified in believing them to this extent, although bound to disregard them under the instructions of the court, so far as they afforded any proof of the right of the plaintiff to have an irrevocable will established in his favor. Indeed, he could recover in this suit only because his contention in the equity suit was decided against him. Clearly if he had succeeded in that suit he could not recover in this. See, also, *Collier v. Rutledge*, 136 N. Y. 621; *Reynolds v. Robinson*, 64 N. Y. 589; *Martin v. Wright's Admr.* 13 Wend. 460; *Robinson v. Raynor*, 28 N. Y. 494; *Schwab v. Pierro*, 43 Minn. 520; *Taylor v. Wood*, 72 Tenn. 504; *Nimmo v. Walker*, 14 La. Ann. 581.

- (3) The defendant's contention that a "man who expects to be made amends by a legacy cannot afterwards resort to his action," would be good if only a mere expectation were shown, and that is what was decided in *Osborn v. Guy's Hospital*, 2 Strange, 728, cited by counsel for the defendant, where the court said: "The plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend, and it looked strongly, as if he did not expect to be paid, but to be considered for it in his will. And the chief justice directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy, can not afterwards resort to his action."

The defendant's exception is overruled.

- (4) The plaintiff's first exception is to the exclusion of the deposition of Father Gabourz, p. 94 of transcript. As, however, the deposition spoken of does not appear as an exhibit and we are not informed as to its contents, we are not able to say that the Judge's exclusion of it was error.

The second exception is to the exclusion of question 156, p. 122, of the transcript: "Did you tell anybody to burn

up that will?" The third exception is to the exclusion of question 157, p. 122 of the transcript: "Was the deed made to your daughter of the property before the will was burned?" These questions were not relevant to the issue in the case, and there was no error in their exclusion.

- (5) Plaintiff's exceptions 4 and 5 are to the admission respectively of the bill of complaint in *Hermenigile Messier v. Cordelia E. Rainville, et al.* in the Superior Court, Kent County, No. 70, and the opinion of the Supreme Court in said case. The plaintiff was not prejudiced by the admission of either the bill of complaint or the opinion. As we have said *supra* he could recover in this suit only because his contention in the equity suit was decided against him. Clearly if he had succeeded in that suit he could not recover in this.

The plaintiff excepted to refusals to charge as follows: Exception 6 to refusal of request No. 1, viz.: "If the plaintiff gave board or services or paid out money for his mother with her consent on her promise to give him her property at her death as compensation, then he can recover a reasonable compensation for such board, services and can recover such moneys paid out by him." This request is faulty. He could not recover upon his testimony unless the defendant had done something to prevent his receiving compensation by will. This should have been included in order to make the request proper. As framed the request was properly refused.

- (6) Exception 7 to refusal of request No. 2, viz.: "If the plaintiff gave board or services or paid out moneys for his mother with her consent with the expectation of being paid therefor by will and his mother expected to pay for the same by will, then he can recover therefor in this action, what is reasonable, as she has by conveyance to her daughter put it out of her power to compensate him by will." We think this request should have been granted.

Exception 8 to the refusal of request No. 3, viz.: "In determining whether the plaintiff expected compensation,

the jury have a right to consider all the facts appearing in the evidence, the amount of money expended, and services rendered for, and board given to the mother, if any." This request was fully covered by the charge. The court was not required to repeat the instruction and the request was properly refused.

- (7) Exception 9 to refusal of request No. 4, viz.: "A small amount of services rendered, or board given for a short time, or small amount of money expended for a mother might be considered a gift, whereas it might be highly improbable that a poor man would give or intend to give a large amount for many years, in these particulars and when other sons and daughters of the mother were contributing nothing."

While the language of this request would be proper enough in an argument to the jury, it embodies no principle of law which the plaintiff was entitled to have stated to the jury by the court. The amount of service rendered would affect the amount of the recovery, but not the right of recovery. The request was properly refused.

- (8) Exception 10 to refusal of request No. 5, viz.: "Whatever the circumstances were, whether any contract was made or not between the parties, the question is, whether or not it is probable that the plaintiff gave these services, paid and expended all this money, without expectation of being paid in some way. If he did so expect compensation and such is the probable inference from the evidence, he is entitled to recover."

This request was based entirely upon the expectation of the plaintiff, and was properly refused.

Exception 11 to refusal of request No. 6, viz.: "Under the plaintiff's testimony in this case he could not bring any action of any kind until his mother, the defendant, had refused to give him her property by will or had made it impossible so to do." If the request had read "support" instead of "bring" an action, we think it would have stated the law correctly. As however it was not technically correct there was no error in its refusal.

- Exception 12 to refusal of request unnumbered, p. 148, viz. :
(9) "If the plaintiff expected to receive compensation for the charges in his bill of items by will, and his mother expected to pay him by will and allowed him to think he would be so paid, then the statute of limitations does not commence to run until in some way she gave him notice that he would not be so paid." We think the plaintiff was entitled to this instruction.

Exception 13, to the charge of the court to the jury, viz. :
"That the decision of the Supreme Court in the equity suit of *Hermenigile Messier v. Cordelia E. Rainville, et al.*, was conclusive that there was no contract to make a will and that there was nothing which could prevent her from revoking it, and that decision settled that question for that case, and this case, which ruling appears in the charge of the Court on p. 138 of said transcript, and the exception of the plaintiff thereto on p. 149 of said transcript." The instruction to which the exception was taken is included in an instruction on pp. 137-140, as follows: "There is much in this case of the kind of testimony which perhaps may tend to confuse the jury and it is my duty in instructing you as to the law to try to eliminate what I conceive to have no relation to the case or to be already settled as between these parties.

"For instance, considerable testimony has been offered here perhaps tending to show that there was, some twenty years ago, an agreement between the mother and the son, on her part to make a will and on his part in consideration thereof to do certain things for her. Now, that question has been tried out in another case between the same parties, as to whether or not there was such a contract and the court, the highest court of this state has decided that there was no contract to make a will and that there was no contract not to (revoke ?) it and there was nothing which would prevent her from revoking it, and that settled that question between those parties for that case and this case, and therefore, Gentlemen, you do not have to consider at all whether or not there was a contract made; you cannot consider, it is

not your province to consider. The Supreme Court has said there was no contract and, therefore, that may be dismissed in so far as that particular point is concerned. I do not mean to say you may not consider all that has been said in relation to that about which I shall charge you presently.

"This case, as I have already said, is one in which the plaintiff claims that there was an implied promise to pay him. I have stated the law as it would generally be between strangers, but as between members of a family or between a son and his mother, services rendered by way of support or care do not imply any promise to pay. The presumption is that they were voluntary. If either one of you gentlemen should have his mother living with him, living in his own house, and there were no specific arrangement about it and any question should arise thereafter, the presumption would be that whatever you did for your mother was intended as a gift, was voluntary. That is the presumption of law, and, therefore, in this case, when this son sues his mother he must overcome that presumption of law by showing circumstances which showed that he is entitled, from the relation of the parties and the circumstances, that he had a reasonable and proper expectation of being compensated for his services. If he shows that was the fact, the circumstances were such, that the dealings between the son and mother were such, that he had a proper and reasonable expectation of being paid for his services, then he would satisfy the requirement of the law and so it was taken out of the nature of being voluntary services and entitled him to recover, to obtain compensation; and that is the question, Gentlemen, for you to determine in this case. Are the circumstances, the dealings of the mother and son such as to show that he had a reasonable expectation of being compensated for his services?

"Now, in considering that question, whether or not the parties made an agreement in this will and talk in relation to it, you might consider all the testimony in relation to that will and what is said by the plaintiff as to whether or

not it indicates an expectation, a reasonable expectation on his part to be paid for his services. For instance, it might appear that there was no contract made to make a will and no contract made on his part to support her. If you are passing upon that fact and reach that conclusion that he didn't comply with the law in doing that, yet the question would remain whether their dealings and intentions were manifest although not affirmatively carried out by the contract. Were their intentions such that he had a fair, reasonable expectation from their dealings that he was going to be paid for it, and you should consider the testimony in that light. You should consider that testimony and all the testimony in the case which shows whether or not these services were gratuitous or were rendered under such circumstances as to entitle him to compensation."

The exception is without merit. The law upon this question has been considered by us upon defendant's exception to the denial of her motion for the direction of a verdict in her favor upon the ground that the issues sought to be decided in this case had been the subject of an adjudication in the former suit, and also that a man who expects to be made amends by a legacy cannot afterwards resort to his action. By the instruction which we have quoted, taken as a whole, the plaintiff was not aggrieved.

Exception 14. "To the charge of the court to the jury, appearing on p. 142 of said transcript, that everything on the claim of the plaintiff prior to July 10, 1903, was barred by the statute of limitations—the plaintiff's exception thereto appearing on p. 149 of said transcript."

There was testimony tending to show an understanding between the plaintiff and the defendant that he would live with and support her and take care of her property during her life and that she was to leave her property to him by will at her death. If such an understanding was shown and it was also shown that he had performed his part of the agreement, until excused from further performance by the act of the defendant, which facts it was within the province of the

jury to find, would his claim be barred as to all services rendered by him prior to six years before the commencement of the suit? In the seventh paragraph of the defendant's answer in the equity suit, which was put in evidence, the defendant says: "This respondent denies the allegations in paragraph seventh of the complainant's bill; and the respondent avers that this complainant was permitted during said time to act as her agent in leasing said property and collecting said rents, and that said complainant was permitted to retain *for his own use and compensation* only such moneys as were not needed to pay the taxes and repairs on the said property and for the personal wants of this respondent." The plaintiff collected the rents, boarded the defendant, paid the expenses and applied the balance to his own use. This continued until the defendant left his house, November 22, 1907, went to live with her daughter and deeded all her property to her daughter, taking a mortgage back conditioned upon her being supported by her daughter during her life.

- (10) "In mutual accounts and dealings an obligation arises not from each item but from and for the balance only. The varying balance is the debt. Hence, the statute of limitations begins to run only from the date of the last item." *Cargill v. Atwood*, 18 R. I. 303. Furthermore, in such a running account, with a promise to pay the plaintiff by will, the plaintiff would have no right of action, in the absence of a repudiation of the agreement, until it had been fully performed.
- (11) In *Schempp v. Beardsley*, 83 Conn. 34, *supra.*, the court said: "Another reason of appeal is the allowance of the claim for services performed more than six years prior to the death of Miss Coffey.

"Her contract being in part for the conveyance of real estate, the plaintiffs can support no action upon it. It was not, however, a mere nullity. While the Superior Court has found that it was void, we understand this to be simply a mode of stating that it was within the statute of frauds.

Such an agreement may be available for some purposes as a factor in constituting a defense. It may also, under certain circumstances, avail to avoid a defense. Such circumstances are presented in the case at bar.

"If the plaintiffs had sued Miss Coffey, during her lifetime, for the reasonable value of support furnished her, she could have set up the oral agreement in defense, to show that it had been furnished under a special contract which fixed a precise compensation, and postponed payment until her decease. *Clark v. Terry*, 25 Conn. 395, 401.

"The law calls on no one to perform a nugatory act. As such a suit could not be maintained, to bring it would have been useless. The statute of limitations assumes the existence of a cause of action and also of what, were it not for the statutory prohibition, would be a right of action. The oral agreement between Miss Coffey and the Schempps purported to give them what would constitute, on due performance of their part of it, a cause of action against her personal representatives for damages, should it be found, upon her death, that she had not done what she, on her part, had agreed to do. So long as she lived, in the absence of repudiation by her, the plaintiffs could not have sued upon the contract, for there would have been no breach; nor for the reasonable value of the support which they had furnished, because that was, by the contract, to be paid for, not by payment of what it was worth, but by a transfer of what she might be worth at her decease, whether more or less than such reasonable value.

"The contract never was repudiated by Miss Coffey during her lifetime. It could not be, so as to affect their rights, without notice of such repudiation to the Schempps. The execution of her will in favor of others she never made known to them; nor would its execution have prevented her from subsequently doing what her agreement with them required.

No right of action, therefore, of any kind, by the Schempps against Miss Coffey, existed during her lifetime. Upon

her death a right of action arose not for damages measured by the value of the estate which she had left, because no action on the special contract could be maintained, but for damages measured by the value of the support furnished. As a foundation for recovering these latter damages, the special contract was material, because it showed that the support was furnished under circumstances which excluded the supposition that either party regarded it as gratuitous. *Grant v. Grant*, 63 Conn. 530, 542, 29 Atl. 15; *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925. It furnished also a sufficient answer to the defense of the statute of limitations, by showing that no action brought earlier could have been maintained. That being so, the right of action did not accrue, either in whole or part, more than six years before Miss Coffey's death, and the plaintiffs were entitled to recover the whole value of the whole support furnished, provided they had made due claim for it."

In *Leahy v. Campbell*, 75 N. Y. Suppl. 72, the court, pp. 74, 75, says: "The referee also found that the decedent agreed to compensate the respondent for services and disbursements by leaving to respondent all his property, both real and personal, but the death of said Clarke was sudden and unexpected, and on that account he failed to perform this agreement. If the respondent rendered services and disbursed moneys upon the faith of such an agreement he is entitled to recover of the estate on a *quantum meruit*, the provision for compensation not having been made as agreed." (citing cases.) "According to the agreement, as found by the referee, there was no obligation to pay until after the death of the employer. Inasmuch as he never repudiated the agreement, there was no breach of contract until he died without having performed it, and the cause of action for services did not accrue until that time. In such case, the statute of limitations is not a bar, and the employé may recover for all services rendered and disbursements made on the faith of the agreement prior to a breach thereof."

In *Collier v. Rutledge*, 136 N. Y. 621, the court quotes the opinion of the Supreme Court appealed from, which contains the following: "The contract between the plaintiff and the decedent, as found by the referee, was that for the additional services to be rendered by the plaintiff, 'he (the intestate) would provide for her in his will or by a codicil.' This must be taken to have been the contract since the finding is supported by evidence, and no question of variance was raised on the trial. The decedent made no testamentary provision for the plaintiff, and it is well settled that when services are rendered to a testator under a contract to make compensation therefor by will, and he dies having made no provision therefor, the person rendering the services stands as a creditor of the estate and may recover from his representatives the value of the services. (citing cases.) The contract excludes the idea that the services were gratuitous." The judgment of the Supreme Court was affirmed.

The cases cited *supra*, hold that, in the absence of repudiation of the contract, to pay for services by will, the statute of limitations begins to run upon the death of the person receiving the services.

In *Bonesteel v. Van Etten*, 20 Hun. 468, the plaintiff from 1855 to 1859 resided with his father as one of his family, and rendered services to him in pursuance of an alleged verbal agreement by which his father was to pay him for said services by a devise or bequest in his will in plaintiff's favor. In 1859 the father discharged the plaintiff from his service, ordering him to leave the house, and saying to him: "You have got all you ever need to expect here." The father died in 1878, and the plaintiff then presented his claim for the services so rendered. The court, p. 470, said: "The contract between these parties, if any existed, was at an end in 1859. The defendant's testator had terminated it with offensive language and driven plaintiff from his house. There was a breach of the contract by the father. He would not allow the plaintiff to earn the wages agreed upon. By such breach of the contract, by such refusal to perform, the

father became liable to plaintiff for the value of the services already rendered. The plaintiff could have brought his action for damages immediately." . . . "The plaintiff in this case has in effect brought his action for his damages caused by the refusal of testator to fulfill his agreement. The amount claimed is the value of the work and labor done by him for his father. Whatever his damages may have been they accrued when his father refused to allow him to go on and fulfill the contract. For an action might then be brought. Hence the statute of limitations began to run for the breach, and the plaintiff's claim has been long barred." See, also, *Ga Nun v. Palmer*, 116 N. Y. S. 23, judgment affirmed 123 N. Y. S. 1117 and *Henry v. Rowell*, 31 Misc. Rep. 384, 64 N. Y. Suppl. 488, affirmed 63 App. Div. 620, 71 N. Y. Suppl. 1137. In this case the court, Gaynor, J., said: "In cases like the present one, where the contract is broken while it is being performed by the parties, the cause of action for the breach which arises at once is the only cause of action which accrues. That the contract is not yet completed is no reason for postponing the commencement of the action to the time when it would be completed, if carried out, and reckoning the running of the statute of limitations from that time. The plaintiff here was not at liberty to continue to treat the contract as in life until the decedent's death. He had not the legal right to require or demand that she leave a will giving him all of her property, notwithstanding that she had not received the consideration agreed upon therefor, nor that she provide in her will for a fair compensation to him (which he is now suing for) for the amount of board and lodging which she had received from him; for she had not agreed to do that. His only right was to demand of her the damage she became liable to him for by her refusal to go on with the contract, and that he places in this action at the value of the board and lodging he furnished to her."

In *Canada v. Canada*, 6 Cush. 15, the plaintiff, in consideration of a promise on the part of the defendant, to leave

him at defendant's decease all his real estate, promised the defendant to remain with him upon his farm, and carry it on so long as the defendant lived, and to forbear payment of his labor, until the defendant's decease, and then to receive the real estate (subject to some legacies to defendant's heirs), in full payment for his services. The defendant conveyed a portion of the estate to another and also cancelled a will made in pursuance of the contract, and subsequently made a new will in violation of the contract. The court, Dewey, J., pp. 17 and 18, said: "If the special contract set forth in the award of the arbitrators was open and unrescinded, and had not been terminated by the acts of either party, it would necessarily defeat the right of the plaintiff to recover for the services he has rendered. The plaintiff concedes this, and seeks to avoid the effect of the special contract as a bar, by showing that the defendant has by his own acts, in conveying to a third person a portion of the real estate, which is the subject of the special contract, incapacitated himself from fulfilling his contract with the plaintiff, and thus authorized the plaintiff to treat the same as rescinded." . . . "In the opinion of the court, a conveyance by the defendant of his real estate, to raise money to discharge his antecedent debts, would be such a violation of this special contract, as to authorize the plaintiff to treat it as determined by the acts of the defendant, and being thus violated by the defendant, to institute an action to recover compensation for his labor and services under the contract."

While therefore in the case of an agreement to pay for services by devising or bequeathing property to the person rendering the services, the right of action ordinarily accrues upon the death, without making such compensation of the person so agreeing to pay, that is not the case where the contract is repudiated. In this case we are of the opinion that the agreement, if any existed, was clearly repudiated by the act of the defendant in leaving the house of the plaintiff and conveying all her property to her daughter, taking back a mortgage conditioned upon her being supported by

her daughter during life. The defendant left the plaintiff's house November 22, 1907, and the conveyance of her property to her daughter immediately followed. The right of action therefore accrued, and the statute of limitations began to run upon said date. The charge of the court that all items of the plaintiff's claim prior to July 10, 1903, were barred by the statute of limitations was erroneous.

The plaintiff's seventh, twelfth and fourteenth exceptions are sustained. His other exceptions are overruled. The case is remitted to the Superior Court for a new trial.

A. B. Crafts, for plaintiff.

Felix Hebert, Vincent, Boss & Barnefield, for defendant.

CLARENCE C. ANDREWS, Admr., vs. FRANCIS L. O'REILLY.

MAY 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Action Against Administrator. Filing Claim in Probate Court. Motion to Dismiss.*

Plaintiff summoned in an administrator to defend a pending suit, but never filed such suit as a claim in the Probate Court as required by Gen. Laws, 1909, cap. 314, § 3, and did not amend the declaration or in any way put anything upon the records to indicate that he had a right to prosecute same against the administrator. Defendant administrator moved to dismiss for lack of jurisdiction, on the ground that the claim had never been filed and there was nothing on which plaintiff could maintain the action as against her.

Held, that the motion was properly granted.

(2) *Action Against Administrator. Filing Claim in Probate Court.*

In a case against an administrator, it is essential to allege and prove that the claim was filed in the Probate Court and disallowed.

(3) *Oral Agreements of Counsel.*

Oral agreements of counsel as to what points shall or shall not be raised in a case, are invalid under rule 28 of the Superior Court.

(4) *Attorney and Client. Waiving Filing of Claim.*

The retainer of an attorney in a suit brought against an administrator confers no implied authority to waive the proper prosecution of the claim according to law.

(5) *Executor and Administrator. Waiving Filing of Pending Suit.*

There is no statutory provision which authorizes the administrator to waive the filing of a claim, on which suit has been brought, as provided by statute Gen. Laws, cap. 314, § 3.

DEBT ON JUDGMENT. Heard on exceptions of plaintiff, and overruled.

PARKHURST, J. In this case there was a motion to dismiss, which was granted by Presiding Justice Tanner in the Superior Court, and the plaintiff brings the case here upon bill of exceptions, the only exception being to the granting by the court of the motion to dismiss.

The circumstances of the case are as follows:

The writ was dated August 30, 1900. The case was entered September 20, 1900. Various demurrers and pleas were filed, several amendments to the declaration were allowed, amended declarations were filed, demurrers and pleas withdrawn, etc., but the pleadings have never been closed. The suit was an action of debt on a judgment obtained against the Woonsocket Opera House Company, and was brought against the defendant as a stockholder in that corporation, in the endeavor to enforce an alleged stockholder's liability under the statutes then in force, relating to such liability.

The defendant, Francis L. O'Reilly, died August 5, 1905, and Irene K. O'Reilly was appointed his administratrix, and the first publication of her notice of appointment was September 14, 1905. The plaintiff never filed this pending suit as a claim in the Probate Court, as required by the statute. (Gen. Laws, 1909, Chap. 314, § 3.) (C. P. A., § 883.)
(1) The plaintiff summoned in the administratrix, but never amended the declaration in any way, and never put anything upon the records of the Superior Court indicating that he had a right to prosecute the case against the administratrix, either by amending the declaration or in any other manner.

On March 27, 1908, a motion to dismiss was filed on behalf of the administratrix, alleging that she was not sub-

ject to the jurisdiction of the court, because the claim had never been filed, and that there was nothing upon which the plaintiff could maintain this suit as against her. The motion was heard and granted by Presiding Justice Tanner on January 13, 1912.

- (2) The action was rightly dismissed upon the motion, as above set forth. The plaintiff summoned in the administratrix, and should have then made such amendments as would show that he had a cause of action against the administratrix. One of the things the plaintiff must allege and prove in a case against the administratrix is that a claim was filed in the office of the probate clerk and disallowed. The motion to dismiss showed to the court that the plaintiff could not truthfully make the necessary amendments. The court, in summoning in the administratrix, had no opportunity to know the facts. The first and only opportunity that the administratrix in this case, had to object to being made a party was by motion after service of process. This motion set forth the objections which the administratrix had to being made a party. As there was no ground to make the administratrix a party, the administratrix was properly discharged upon motion. It was not only the right but the duty of the judge to act upon this matter upon motion, and so save the state and the parties the great expense of litigating the intricate questions of law arising upon the pleadings in the case, since failure to prove the proper filing of the claim and its disallowance, under the statute above cited must have led to the dismissal of the action upon the motion for a nonsuit, even if the case had been allowed to come to trial.

It was admitted by the plaintiff that the claim had not been filed, and the only excuse is contained in two affidavits in which it is claimed that Mr. Heffernan, the attorney for the administratrix, told the attorneys for the plaintiff that he would not raise the point that the claim had not been filed. Mr. Heffernan denies that these affidavits are true. The judge acted upon the motion in favor of the ad-

ministratrix. But the affidavits are entirely immaterial. All that they suggest in any way is that there was an oral
(3) agreement between counsel as to what point should or should not be raised in a case then pending in the Superior Court. Such oral agreements are invalid under rule 28 of the Superior Court, as follows: "All agreements of parties or attorneys touching the business of the court shall be in writing, unless orally made or assented to by them in the presence of the court when disposing of such business, or they will be considered of no validity."

It cannot be said that these affidavits show a waiver by the administratrix of the filing of the claim in the Probate Court. The affidavits do not show that Mr. Heffernan
(4) possessed any authority more than what is implied by his retainer as attorney in this case. The retainer of an attorney in a law suit brought against an administratrix does not give him any implied authority to waive the proper prosecution of the claim, according to law. The statute contains no provision which authorizes the administratrix to waive
(5) the filing of the claim as provided by the statute above cited. (See *Thompson v. Hoxsie*, 25 R. I. 377, 381.)

For these reasons this court is of the opinion that the suit was properly dismissed upon the motion by the Presiding Justice of the Superior Court, and the plaintiff's exception is therefore overruled. The case is remitted to the Superior Court, with direction to enter its judgment of dismissal upon the decision.

Bassett and Raymond for plaintiff.

R. W. Richmond, of counsel.

John J. Heffernan, James H. Rickard, Jr., for defendant.

HENRY M. FOX *vs.* ARTESIAN WELL & SUPPLY COMPANY.

MAY 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Error and Appeal. Review. Exceptions. Removing Default. Judgments.*
 Art. XII of Amendments to Cons. R. I., Section 1, provides that "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity."

Gen. Laws, 1909, cap. 272, § 2, provides "The supreme court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided."

Held, that the court had jurisdiction to entertain a bill of exceptions based on an alleged abuse of judicial discretion in vacating a *nil dicit* judgment in the Superior Court.

TRESPASS ON THE CASE for negligence. Heard on motion of defendant to dismiss plaintiff's bill of exceptions, and denied.

PER CURIAM. The plaintiff obtained a *nil dicit* judgment against the defendant in the Superior Court which was vacated by said court upon motion of and for cause shown by the defendant, within six months from the rendition of said judgment. To this action of the court the plaintiff excepted and has prosecuted his bill of exceptions to this court. The defendant moves to dismiss said bill of exceptions upon the ground that the action of the Superior Court in vacating said judgment is final and conclusive and not subject to review by this court. The plaintiff claims that the judge of the Superior Court who caused said judgment to be vacated as aforesaid, in so doing did not exercise, but did abuse his judicial discretion in the premises. Under Art. XII of Amendments to the Constitution of Rhode Island, Section 1: "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity," . . . and under Gen. Laws, 1909, cap. 272, § 2: "The supreme court shall

have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided." . . . Thereunder this court has jurisdiction to entertain a bill of exceptions brought for the purpose of correcting alleged "errors or abuses" in the Superior Court. The bill of exceptions in question is brought for the correction of an alleged abuse of judicial discretion by a justice of the Superior Court and comes within the purview of the statute aforesaid.

The defendant's motion to dismiss is therefore denied.

Joseph C. Cawley, Frederick J. Berth, for plaintiff.

Tillinghast and Lynch, for defendant.

MARGARET E. LYNCH vs. CHARLES W. LYNCH.

MAY 13, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Divorce. Grounds. In Pari Delicto.*

Upon a petition for divorce, on the ground that the marriage was void, for the reason that at the time, petitioner had a husband living, who was still alive, it was error for the court to dismiss the petition on the ground that petitioner was *in pari delicto* with the respondent, since the second marriage was a nullity and the court should so declare. Under such facts the legal status of petitioner is something in which the State as well as the parties is interested.

PETITION FOR DIVORCE. Heard on exceptions of petitioner, and sustained.

PER CURIAM. The evidence clearly shows that at the time of the marriage of the above named parties the petitioner had a husband living, who is still alive, and that they have never been divorced. The respondent prior to his marriage with the petitioner obtained for, and gave to her, a paper purporting to be a decree of divorce from her husband, but which was of no validity. Upon the

strength of the same and his representations to her she married him and they lived together as man and wife for many years. For the past ten years they have not cohabited. The petitioner applied for a divorce from the respondent upon the ground of non-support. The case was heard, as an uncontested petition, and decision was rendered in her favor. Subsequently the respondent made application to the court to vacate the decision and reinstate the case, in order that he might contest the same, which motion was granted by the court. The counsel for the petitioner thereupon made preparation for another trial of the case and in the course of his investigations learned of the former marriage of the petitioner; ascertained the residence of her first husband and had an interview with him, which disclosed the fact of the first marriage and that the same had never been annulled or terminated, whereupon the petitioner amended her petition for divorce by alleging that her marriage with the respondent was originally void. The case was then heard by a justice of the Superior Court who decided that the petitioner had not come into court with clean hands and thereupon dismissed the petition. His opinion was that the petitioner knew or ought to have known that she was not divorced from her first husband, and that her continued cohabitation with the respondent was of a wilfully bigamous nature and that she was not entitled to relief in the premises under such conditions. Her legal status however is something in which the State as well as the parties is interested. If, as a matter of fact, she was already married when she undertook to enter into the married state with the respondent such second marriage was a nullity and the court should so declare. The judge of the Superior Court found such to be the fact and declined to give decision for the petitioner solely upon the ground that she was *in pari delicto* with the respondent. In this the court erred. The petitioner's exception to the ruling of the justice is therefore sustained and the respondent will be given an opportunity,

on the third day of June, 1912, at ten o'clock a. m., to show cause why said case should not be remitted to the Superior Court, with direction to forthwith enter a decision in favor of the petitioner, granting her petition, and annulling the marriage between her and the respondent on the ground that the same was originally void in law, the final decree in such case to be entered in accordance with the statute in such case made and provided.

Page and Cushing for petitioner.

Cassius L. Kneeland, for respondent.

JAMES CLARY vs. ANNIE T. WOLF.

MAY 13, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland and Vincent, JJ.

(1) *Contracts.*

Evidence held, insufficient to show a contract between the parties.

(2) *Evidence.*

In assumpsit to recover for work and labor the admission of question to defendant "you intended to have these steps fixed, at all events?" while immaterial was not prejudicial error.

(3) *Contracts. Acceptance.*

In assumpsit for work and labor in the construction of a staircase on property in possession of tenant of defendant, charge of the court, that if the jury found the work was done without request of defendant and under a mistake by plaintiff, and that defendant ordered it removed, yet if she used the staircase or permitted her tenants to do so, plaintiff could recover, constituted reversible error, since by the notice to remove the work performed without her knowledge defendant had done all she was required to do and there was no evidence of any use, by which a ratification might be shown.

Upon such facts the burden of seeing that tenants did not use a staircase which from want of proper surroundings was neither available nor led to anything which a tenant might require was not cast upon defendant and the fact that a tenant *might* have used the steps at some time would not amount to their acceptance by defendant.

ASSUMPSIT. Heard on exceptions of defendant, and sustained.

VINCENT, J. This is an action on the case in assumpsit brought to recover the sum of \$56.35 for labor performed and materials furnished in the building and setting of a flight of steps, connecting different levels, upon a lot belonging to the defendant at Riverside.

The case was tried to a jury in the Superior Court and a verdict was rendered for the plaintiff for the amount claimed. The defendant's motion for a new trial, before the trial judge, was denied. The case now comes to this court upon defendant's exceptions; (1) that the justice presiding erred in his decision denying the defendant's motion for a new trial; (2) that the justice presiding erred in permitting the plaintiff's counsel to ask the defendant if she "intended to have these steps fixed at all events," and (3) that the justice presiding erred in the portion of his charge to the jury regarding the subsequent ratification of the contract by the defendant.

The defendant was the owner of an estate at Riverside, situated near tide water, upon which there was a dwelling house or cottage. Between the cottage and the water was a bank which required, for convenient passage from one level to the other, a flight of steps. Upon the lower level and near the water, it was the intention of the defendant, at some later period, to erect a bath house. The plaintiff, for several years, had been employed by the defendant, from time to time, in and about certain other of her property, located in the city of Providence, making small repairs, which were uniformly done under her immediate direction and supervision. In the spring of 1909, while one Olney Aldrich, an employee of the plaintiff, was doing some repair work at the defendant's house in Providence, it is alleged that the defendant made some remarks to him, in effect, that she would need some steps upon her Riverside estate and requested him to go there and take some meas-

urements. Upon this request, and without any further report to or conference with the defendant as to cost, location, etc., the plaintiff built and set the steps upon the defendant's estate.

The defendant refused to pay the bill when presented, and she testifies that she ordered the plaintiff to remove the steps; (1) because she had not ordered them; (2) because they were not satisfactory, and (3) because they were not located where she desired to have them.

The plaintiff in support of his claim alleges, and testifies, that subsequent to the time when the order for the steps was given to Aldrich, to wit, May 20, 1909, the defendant called at his office, for the purpose of paying a bill for some other work, and while there made some statements which were interpreted by him as a ratification of the order previously given to Aldrich; that she made some inquiries as to whether the measurements had been taken and expressed dissatisfaction upon learning that the work had not been completed.

There is a conflict of testimony as to just what was said between the parties, after the plaintiff had finished the steps, but there is no dispute on the part of the plaintiff that he proceeded to do the work and furnished the materials upon the simple request of the defendant to take measurements and her alleged subsequent ratification of the contract. It is undisputed that the plaintiff had not previously done any new or original work for the defendant and that such service as he had before rendered to her related to minor repairs which had been performed under her especial direction and supervision.

Taking the testimony for the plaintiff alone we do not see anything which would amount to a contract authorizing the plaintiff to proceed with this work, after making the necessary measurements, without some further act or direction on the part of the defendant.

The plaintiff does not claim any personal knowledge of the original contract with the defendant, but says he under-

stood that such a contract had been made with Aldrich. He claims, however, that she ratified such contract in a later interview with him. Upon this point the plaintiff testified as follows: "Q. 21. Now, what did she say to you? A. Finding fault with me because the work was not done according to orders. She was present at my office, and on that day, which I can give the date if you desire it, she made a payment of \$10 on a previous account that was due me, and found fault then because I hadn't completed the stairs; and the reason that I gave to her, and the only reason, was the inclemency of the weather preceding that date. Q. 47. Now, you state that at that time she came in and found fault. A. I did. Q. 49. Can you remember the exact words she said? A. The conversation was fairly lengthy. I do not know as I can give the details of it, but a synopsis of it. Q. 50. See if I can recall to you the statement that was made. Was not this the statement. 'Have you been down to Riverside to my place?' A. No, sir, that was not mentioned in those words. I am positive of that. Q. 57. And the only thing at your office, she complained that you had not gone down? A. That I did not do the work. Q. 58. And what work, did she say, at your office? A. Building the steps. Q. 59. Was there any agreement or contract made at your office? A. No contract. The agreement, so far as she told me, was to build the steps immediately. She had the cottage let. Q. 97. Can you recall the exact conversation that you had on the 20th by which she authorized you to do this work? A. . . . The conversation is so involved I cannot tell it in detail. Q. 98. Kindly state what you can remember of the conversation. A. Miss Wolf wanted to know if the steps at Riverside had been placed there yet. Q. 99. I am talking about the exact words. Can you remember them? A. I cannot tell you in detail. Q. 100. Any exact words by which you assumed to have authority to build those steps. A. I am telling you; this woman found fault because I hadn't the work done there as ordered.

She was in a hurry for them on account of the fact that she had let the cottage, and there was a tenant who wanted to move in and use the place. Q. 105. And didn't she ask you to go down and estimate? A. No, sir. Q. 107. And isn't that all the conversation that she had with you in regard to the steps in 1909? A. In substance, yes, sir. Q. 108. That she wanted you to go down and figure on the steps? A. And finding fault because they had not already been built or completed. . . ."

Olney Aldrich, the man with whom it is claimed the contract for the steps was made, testified to some conversation with the defendant, regarding steps, while he was doing some work for her at her house in Providence. "Q. 13. What was said at that time? A. She said she wanted a pair of steps built from the Riverside house, and wanted to know when I could go down and measure for them. Q. 17. Did she order the work done at that time? A. She told me to go down and measure for the work, yes, sir. Q. 51. All she asked you to do was to take measurements for the steps? A. Yes, sir."

The foregoing testimony of the plaintiff and his employee, Aldrich, comprises substantially all of the testimony upon which the plaintiff bases his claim of a contract to build the steps. The plaintiff had no personal knowledge of any contract through Aldrich, but he relies principally, so far as his testimony goes, upon the subsequent ratification at his office. He claims that the ratification of the contract was contained in some conversation of the defendant with him. His testimony upon that point, however, amounts to nothing more than his conclusions drawn from the language of the defendant which he can now neither repeat nor remember.

- (1) Aldrich, the employee, in answer to the question "Did she order the work done at that time," referring to the time when the defendant asked him to make measurements, said, "She told me to go down and measure for the work, yes, sir." It is evident that this witness simply concluded

that the request to make measurements was equivalent to an order to go on and complete the work without further reference to the defendant.

Taking into consideration other undisputed testimony that the plaintiff had never before done any original work for the defendant; that the defendant did not know that the steps were being made or had been placed in position until she received the bill for them; that she was not consulted as to the place where they were to be located; that the place where they were located was not ready for their reception and that the bath-house, in connection with which the steps were to be used, had not been built, we do not find that there was that meeting of minds which is the essential feature of a contract. The court can hardly find that there was a contract and base such finding upon the interested opinion of the plaintiff as to the force and legal effect of the defendant's language which he has now forgotten.

- (2) The defendant's second exception is based upon the ruling of the trial court, admitting the following question: "Q. 105. You intended to have these steps fixed, at all events."

This question was objected to by the counsel for the defendant, the objection was overruled and the witness answered, "From him?" "Q. 106. No, from some one. A. Yes, sir, I did."

While we cannot see that the ultimate intention or mental attitude of the defendant is either important or material, we cannot say that the answer to the question could have been appreciably injurious to the defendant's case.

- (3) The portion of the Judge's charge excepted to contains in our opinion reversible error, and is as follows: "Now, gentlemen, if you find no request was made; that this staircase was built by him at his own volition, under a mistake, and that since that time there has been no ratification of the contract at all, or, as she says, she ordered him to take it away, then your verdict should be for the defendant. As I say, unless there has been some ratification of

that contract; and he says there has, because since that time this property has been let to tenants who could, if they wanted to, use the staircase in question.

"If that be so, and you find that although there was no request in the beginning to build this staircase, and he built it under a mistake, if you find that subsequent to that time, that even though she ordered him to remove it and he did not do it, and she went on after that time and used that staircase, or permitted her tenants to use that staircase, then your verdict should be for the plaintiff."

There is no evidence that the defendant or her tenants made any use of the steps. There is testimony showing that the steps could not practically be used without considerable filling about the bank, and that there was no occasion to use them for the reason that the bath-house, to which they were designed to afford access, had not been erected. If the defendant knew nothing of these steps until after they had been placed upon her lot, and within a reasonable time she gave notice to the plaintiff to take them away, she would have done all that she was required to do under the circumstances. She could not very well remove them herself and there being no evidence that she either used them, or permitted her tenants to use them, we cannot find any proof of ratification through the use of the steps. The defendant had a perfect right to rent her estate and we believe that it would be unreasonable to place upon her the burden of a constant oversight of her tenants to see that they did not use the steps which from the want of proper surroundings were neither available nor led to anything which a tenant might require or could enjoy. The fact that the tenants *might* have passed over these steps at some time would not amount to their acceptance by the defendant. We think that the portion of the charge referred to would be likely to mislead the jury in reaching its verdict. The second exception of the defendant is overruled. The other exceptions of the defendant are sustained.

The case is remitted to the Superior Court for a new trial.

James J. McGovern, for plaintiff.

Frank H. Wildes, for defendant.

SARAH E. TOURJEE vs. JOHN MATTESON, T. T.

EVERETT L. TOURJEE vs. JOHN MATTESON, T. T.

MAY 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Suit Against Officer Revived Against Successor.*

During the pendency of an action against defendant as town treasurer, defendant was re-elected, but resigned and a new treasurer was elected by the town council. Over a year from the qualification of latter, he was summoned in to answer the case and entered a general appearance. Subsequently on motion the case was dismissed under Gen. Laws, 1909, cap. 283, § 13, providing that no action pending against any officer in his capacity as such shall abate in consequence of his ceasing to hold his office within one year thereafter, but at any time within such year his successor may be summoned in to defend such action.

Held, properly dismissed.

Saunders vs. Pendleton, 19 R. I. 659, affirmed.

(2) *Suits Against Officer. Revival. Abatement.*

Under Gen. Laws, 1909, cap. 283, § 13, suits against an officer become dormant upon his death or ceasing to hold office, subject to be revived at any time within a year thereafter, but in case no successor enters appearance within the year the suit abates by operation of law, and having abated can not be revived. Therefore the questions of general appearance and waiver have no application.

(3) *Statutes. Construction. Marginal Notes.*

Marginal notes to statutes while no part of the same, yet afford some indication of the construction placed thereon by the compilers thereof.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff, and overruled.

DUBOIS, C. J. These actions were brought by the plaintiffs against John Matteson as town treasurer of the town of Coventry, in Kent county; that of Sarah E. Tourjee for

damages as the result of an accident to her, which took place on June 17, 1906, caused, as alleged in the declaration, by reason of a defective highway; and the action of Everett L. Tourjee, her husband, for loss of wife's services.

The defendant was reëlected to the position of town treasurer in June, 1909, and subsequently resigned or declined to serve, and one Greene was appointed town treasurer by the town council in his place. The plaintiff had notice that the defendant was reëlected, but was unaware of the fact of his declination or that a new town treasurer had been appointed. A little over a year after the qualification of Mr. Greene the plaintiffs' attorney learned of the foregoing facts and made a motion which was granted whereunder the new town treasurer, Greene, was summoned in to answer these two cases; and through his attorney, entered a general appearance without any objection to the time elapsed. Subsequently, on the 19th day of November, A. D. 1910, on motion of the defendant, appearing among the files in the cases, the cases were dismissed under Gen. Laws, 1909, cap. 283, § 13 of the General Laws. The decision of the court was based upon the case of *Saunders v. Pendleton*, 19 R. I. 659.

The exceptions of the plaintiffs in both cases are as follows:

"1. That the Court erred in granting said motion to dismiss, the exception to which ruling appears on 'page 8' of the transcript herewith filed.

"2. That on the evidence offered by the defendant to sustain said motion, the Court erred in granting the same.

"3. That the new Town Treasurer, Green, having been duly summoned in to answer said case as successor to the said Matteson, and having entered a general appearance without any objection to the lapse of time of more than one year after John Matteson had ceased to be Town Treasurer of the said Town, it was too late to file any such motion to dismiss, and the Court erred in granting the same.

"4. That the fact that said Matteson had ceased to

be Town Treasurer of said Town of Coventry, on the 14th day of June, A. D. 1909, and that the new Town Treasurer, said Green, was not summoned in to answer said case, until more than a year thereafter, is no ground for dismissing said action, and the Court erred in granting said motion."

The plaintiffs' claims are as follows:

"*First*: That the said decision in *Saunders vs. Pendleton* is wrong, erroneous and should be overruled.

"*Second*: That by entering the general appearance, the defendant waived the right to make the motion to dismiss."

The consideration of this case involves the construction of Gen. Laws, 1909, cap. 283, § 13, which reads as follows: "Sec. 13. No action, suit or proceeding, commenced or pending by or against any officer, receiver, or trustee, in his capacity as such, shall abate in consequence of his death, or of his ceasing to hold his office, place, or trust, within one year thereafter; but at any time within one year thereafter his successor in the office, place, or trust may come in and take upon himself, or he may be summoned in to take upon himself, the prosecution or defence of such (3) action, suit or proceeding." Although the marginal notes to statutes are no part of the same, nevertheless they afford some indication of the construction placed thereon by the compilers thereof.

The marginal notes accompanying the section under consideration read as follows: "Proceedings by or against any officer, receiver or trustee may be revived by or against his successor within one year." We have no doubt that the present actions are within the purview of this statute— (1) see *Saunders v. Pendleton*, 19 R. I. 659. Nor have we any doubt as to the correctness of the doctrine announced in that case. Under the statute referred to suits against an officer do not abate immediately upon a vacancy occurring in his office by reason of his death or of his ceasing to hold the same, but become dormant, as it were, subject to be revived at any time within a year thereafter, by the ap-

pearance in court of his successor; but in case no successor makes appearance within the year the suits abate by operation of law, by expiration of the time within which they may be revived. In other words, the comatose condition of the suits terminates in their death. Having abated they cannot be revived. Therefore the questions of general appearance, waiver and the like, have no application in the premises.

The plaintiffs' exceptions are therefore overruled, and the cases are remitted to the Superior Court within and for the county of Kent, for further proceedings.

A. B. Crafts, for plaintiff.

E. K. Parker, for defendant.

J. P. MORGAN & Co. v. HALL & LYON Co.

MAY 14, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Corporations. Guaranty. Ultra Vires.*

While a corporation is not ordinarily bound by a contract of guaranty, for the benefit of third parties, such guaranty may be given in the accomplishment of any object for which the corporation was created or when the particular transaction is reasonably necessary or proper in the conduct of its business, and whenever an act may under any circumstances be reasonably necessary, a party dealing with the corporation has the right to assume, without notice to the contrary, that the act is binding upon it.

(2) *Corporations. Ultra Vires. Guaranty.*

Defendant corporation operating a drug store, by its treasurer signed a written guaranty of a letter of credit issued by plaintiffs to X. There was no evidence to show whether X. was in any way connected with defendant.

Held, that there was nothing in the transaction to excite suspicion that the matter was one of accommodation and the fact that the letter of credit was in the name of a woman was not sufficient to put plaintiffs upon inquiry, and plaintiffs were entitled to the presumption that the treasurer was acting within his authority.

(3) *Contracts. Consideration.*

Plaintiff undertook to furnish to X. a letter of credit for a certain sum to be drawn by her at such times and in such amounts as she might determine

and defendant guaranteed to pay such amounts to plaintiff as might be drawn upon such letter.

Held, that X. having received the amount of the letter of credit the conclusion was inevitable that she received the money by virtue of some arrangement between plaintiff and his correspondents, and there being no failure of consideration defendant was liable under the terms of such guaranty.

ASSUMPSIT. Heard on exceptions of plaintiff, and sustained.

VINCENT, J. This is an action at law brought by J. P. Morgan & Company to recover from the defendant corporation damages for breach of its written guaranty of a letter of credit issued by the plaintiffs to Emily Alpers, the guaranty being signed by the defendant corporation by its then treasurer, George C. Lyon. The guaranty is as follows:

“GUARANTEE.

“LETTER OF CREDIT No. N———NEW YORK, Aug. 19, 1907.

“Whereas, J. P. Morgan & Co. have given to Miss Emily Alpers their Circular Letter of Credit, No. N——— for 200 pounds or Fcs. 5050 we hereby guarantee and agree, on demand, to pay said J. P. Morgan & Co. the amounts drawn against said Letter of Credit, together with usual charges.

“In case this credit be either lost or stolen we hereby authorize J. P. Morgan & Co. to send the usual Circular to their Correspondents, notifying them of the loss, and to take such precautions as they may deem advisable for the prevention of fraud, agreeing to pay any expenses attending the same, and in case of the cashing of any drafts by any banker, under the usual precautions, and before the receipt of any circular, we agree to indemnify J. P. Morgan & Co. for any loss therefrom.

“HALL & LYON Co.,
“GEO. C. LYON, *Treasurer.*”

The letter of credit was issued in August, 1907, and was for 200 pounds, sterling. Against this letter of credit six

drafts were drawn; three of which drafts are still unpaid,—to wit, one for 17 pounds, one for 54 pounds, and one for 100 pounds. The amount due on this letter of credit in United States money, at the then current rates of exchange, was \$845.98, not including interest.

The case was tried in the Superior Court without a jury and a decision was rendered for the defendant, whereupon plaintiffs filed their bill of exceptions upon two grounds, (1) that the said decision was against the law and (2) that said decision was against the evidence and the weight thereof.

The defendant contends that the Hall & Lyon Company being a trading corporation, the act of its treasurer, in signing the guaranty, was without authority and so simply an act for the accommodation of a third party to whom the letter of credit was issued, and therefore, that it was *ultra vires* as to the defendant corporation, and also that the plaintiff took such guaranty with notice of its character.

The plaintiffs deny both of these propositions and claim (1) that the guaranty was issued by the treasurer of the defendant company under full apparent authority to bind the defendant company; that his act was not *ultra vires*, there being no evidence that such guaranty was for the accommodation of a third party, (2) that the plaintiffs took the guaranty in good faith without notice, actual or constructive, there being nothing surrounding the transaction to suggest inquiry as to the validity or purpose thereof, and (3) that the defendant knew that the guaranty was accepted in good faith and in the belief that it would be recognized and the drafts drawn on the letter of credit would be paid by the defendant, and therefore the defendant became bound to make such payment.

There is nothing in the testimony tending to show whether or not Emily Alpers was in any way or manner connected with the defendant company.

- (1) It is, no doubt, the general rule that a corporation is not ordinarily bound by a contract of guaranty for the benefit of third parties, but that such guaranty may be

given in the accomplishment of any object for which the corporation was created or when the particular transaction is reasonably necessary or proper in the conduct of its business. *Clark & Marshall, Private Corporations*, § 184-184 c; *Thompson on Corporations*, § 2218-2226.

There is also good authority for the position that whenever an act may, under any circumstances, be reasonably necessary to carry out the purposes of incorporation, the party dealing with the corporation has a right to assume, without notice to the contrary, that the act is binding upon it. *Greene's Bryce's ultra vires*, p. 37 *et seq.* p. 40 a. The defendant corporation might properly guarantee a letter of credit under some circumstances as, for instance, if it were sending someone abroad to purchase goods and the (2) plaintiffs would have the right to assume, both from previous dealings with the defendant and from lack of notice, that the guaranty was in furtherance of the defendant's legitimate business. Taking into consideration the well known fact that drug stores keep on hand and offer for sale a large variety of articles which cannot be classified as drugs, and the further fact that women have been employed, in recent years, in a great variety of occupations, including heads of departments, buyers and in many other positions connected with mercantile business, we do not think that the issuance of the letter of credit in the name of a woman would be sufficient to put the plaintiffs upon inquiry.

There was nothing in the transaction which was calculated to excite the suspicion that the letter of credit was a matter of accommodation, and there was no testimony upon that point. So far as appears, the letter of credit was issued and the guaranty obtained in good faith from an officer of the defendant company having, apparently, the required authority to act as he did. The plaintiffs had no actual or constructive notice that the letter of credit was to be used for purposes unconnected with the defendant's business. Under these conditions the plaintiffs would be

entitled to the presumption that in guarantying the letter of credit the treasurer of the defendant company was acting within his authority.

We do not think that there is anything in the case of *Cook v. American Tubing & Webbing Company*, 28 R. I. 41, which should restrain the court from finding the defendant liable. In that case certain claims were allowed and certain others disallowed. Claims which bore upon their face the evidence that the transaction was for the accommodation of third parties were disallowed, while others which did not bear such evidence, and were not surrounded by circumstances calculated to arouse suspicion, were allowed. The court said in that case: "We need not consider the question whether the assignment of accounts was a form of security which the general manager was authorized to make. Whether he could do so or not . . . there was nothing in his offer to do so which was calculated to excite the suspicion that the loan was required for any purpose other than the ordinary uses of the webbing company. Whether, if the security had been real, the complainant could hold it, is not now material. The loan was made in good faith to an officer having apparent authority to contract it, the lender had no actual or constructive notice that it was procured with fraudulent intent to appropriate the money lent and we must consider the claim a valid one against the webbing company and its assets in the hands of the receivers."

This language of the court seems to us to cover the case at bar. There was nothing in the transaction which was calculated to excite the suspicion or apprise the plaintiffs that the proceeds of the letter of credit were to be devoted other than for the purposes of the defendant company.

- (3) The defendant contends that there has been no breach of contract by the defendant. That assuming that the contract upon which the suit is brought was a contract within the power of the corporation to make, and within the power of the treasurer of the corporation to make in its behalf, upon the record, there is no liability from the defendant to the plaintiff.

With this contention of the defendant we cannot agree. The defendant in and by its guaranty promised to pay to the plaintiff "the amounts drawn against said letter of credit." Letters of credit only become useful and serviceable to the traveler, through the general credit of the party issuing the same, or through some arrangement made with bankers within the territory to be traversed. In the case before us it is admitted that Emily Alpers received upon her letter of credit the full sum for which the same was issued. The conclusion is, therefore, inevitable that she received the money by virtue of some arrangement between the plaintiffs and their correspondents abroad. What those particular arrangements were does not seem to us to be important in the present controversy.

The plaintiffs undertook to furnish to Emily Alpers a letter of credit for a certain amount of money to be drawn by her at such times and in such amounts as she might determine, and this undertaking the plaintiffs performed. Under these conditions the defendant guaranteed to pay such amounts to the plaintiffs as might be drawn upon said letter. The consideration for the guaranty was to make available to Emily Alpers the sum of money expressed in the letter, and inasmuch as there has been no failure of consideration, we cannot see why the defendant should not pay the balance due to the plaintiffs in accordance with its agreement.

The plaintiffs' exceptions are sustained and an opportunity will be given to the defendant to appear and show cause, on June 3, 1912, at ten A. M., why judgment for the plaintiffs in the sum of \$845.98, with interest, should not be entered.

Dexter B. Potter, Edward A. Stockwell, for plaintiff.

C. M. Van Slyck, Frederick A. Jones, for defendant.

ABRAM BARAN vs. MAX SILVERMAN.

MAY 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst and Sweetland, JJ.

(1) *Trespass. Case. Negligence. Assault and Battery.*

In an action of trespass for assault and battery, wherein plaintiff claimed to have been struck by a pail thrown by defendant, instruction that if defendant unintentionally and carelessly allowed it to drop and strike plaintiff he was liable, but only for compensatory damages, was erroneous and unsupported by the evidence, which on the part of the plaintiff showed a wilful and intentional act and on the part of defendant an unconscious act due to faintness.

(2) *Trespass. Case. Negligence. Assault and Battery.*

An action of trespass for assault and battery is based upon wilful and intentional acts and not upon negligence, and evidence of negligence on the part of a defendant is inadmissible. Where plaintiff intends to rely upon the negligence of the defendant the form of action should be in trespass on the case. Hence, in an action of trespass for assault and battery, instruction that if defendant unintentionally and carelessly dropped the instrument by which plaintiff claimed to have been struck, he was liable, but only for compensatory damages, was erroneous.

TRESPASS FOR ASSAULT AND BATTERY. Heard on exceptions of defendant, and sustained.

PARKHURST, J. This case was tried before a justice of the Superior Court, sitting in the County of Providence, with a jury, on March 21st and 22d, 1911, and a verdict was returned in favor of the plaintiff in the sum of one hundred and ninety-three dollars.

The action is in trespass for assault and battery and the circumstances as shown by the evidence were as follows: Upon January 30th, 1910, the plaintiff, with his minor son, visited a building upon Hilton street, in the city of Providence, customarily visited by Jewish people of the neighborhood for the purpose of taking baths. While there and engaged in the act of bathing his son, the plaintiff was suddenly struck in the ear by a pail, such as was commonly used by all the bathers, which pail came from the direction

of the defendant. The defendant admitted that he had been using it. The plaintiff and defendant were strangers. They differ materially in their account of the occurrence. The plaintiff claims that the defendant, who was seated behind and above him at a distance of about three feet, while in the act of pouring cold water upon his head from the pail, which he held aloft, spilled some of the water upon the plaintiff's son; the plaintiff says that he thereupon remonstrated with the defendant who became angered, insulted him and finally threw the pail striking the plaintiff in the ear nearly severing the same. The plaintiff does not claim to have seen the pail thrown by the defendant, but did see it coming towards him and the defendant's hand uplifted, and maintains that the conditions warranted him in concluding that the defendant did throw it.

The defendant, although admitting that the pail which he was using was the one which caused the injury, maintains that he was not responsible, because, owing to the heat due to the presence of steam in the room, he was overcome, so that at the moment he raised the pail of cold water, intending to pour it upon his head for the purpose of relieving his condition, it slipped from his hands, through weakness, and that he was unaware that it fell upon the plaintiff, until after the injury had occurred.

- (1) The case now comes before this court upon exception to certain parts of the charge of the Superior Court wherein the jury was charged as follows: "If, however, he raised this pail above his head and unconsciously—I wouldn't say unconsciously, but unintentionally, but carelessly, allowed it to drop out of his hands and strike the plaintiff, he would be liable in that case, but he would only be liable for such damages as would fairly compensate the plaintiff for the damages sustained." . . . "But if the injury occurred simply by a careless act on the part of the defendant and he dropped the pail and struck the plaintiff when he had no intention of doing so, in that case it would not be proper to award any punitive damages, but simply such damages

as would fairly compensate the plaintiff for the injury done."

We are constrained to hold that these instructions were erroneous. The action was trespass for assault and battery. The plaintiff claimed that the act of the defendant was wilful and intentional growing out of bad temper arising from an altercation; the defendant denied this and claimed that he dropped the pail unconsciously because he was faint from the heat of the steam; so that there was no evidence of negligence on the part of the defendant. This portion of the charge was therefore gratuitous and had no support in the evidence.

- (2) Furthermore, the declaration being in trespass for assault and battery is based upon wilful and intentional acts, and not upon negligence, and evidence of negligence upon the part of the defendant would have been inadmissible. If the plaintiff had intended to rely upon the negligence of the defendant as a cause of action his proper form of action would have been trespass on the case for negligence. *Fallon v. O'Brien*, 12 R. I. 518, 521.

In *Krall v. Lull*, 49 Wis. 403, which was a civil action for assault and battery alleged to have been made by defendant by the discharge of a loaded pistol at the plaintiff the court charged that if defendant did not assault the plaintiff, but the pistol, being in his hand for a lawful purpose, was discharged by careless handling or by accident, there could be no recovery in this action; the charge was held correct.

In *Razor v. Kinsey*, 55 Ill. App. 605, it is said, p. 614: "Willfulness, or intention on the part of the defendant to do the injury to the person of the party injured, is held to be essential to the establishment of liability of the defendant in an action of trespass for an assault and battery, and malice or wantonness besides, to an allowance for vindictive damages. There may be trespass to the person and liability for the actual damage, without intention to commit it, but not an assault and battery.

“For aught that this record discloses, the jury may have believed the testimony of the defendant and Curtis Razor, rather than that of the plaintiff, and found that all of the injuries to plaintiff were due solely to the collision of the carts, and that this was unintentional on the part of defendant; but, under the instructions given, that having put in motion and been in charge of the force that caused it, it was his misfortune that he was unable to control it, which he must bear, and pay the damage resulting to plaintiff; that the amount found was only a fair compensation for his injuries; and that, had they been instructed that there could be no rightful recovery in this action for such unintentional injury, they would have found for the defendant.”

It would seem that the jury must have been governed in their finding by this improper instruction. They returned a verdict for the plaintiff for \$193. The testimony undisputed shows expenses for surgeon's and doctor's bills of about \$150, and loss of business due to enforced absence therefrom of about \$150; it would not be likely that the jury would award less than the actual damages proved, if they believed the plaintiff's story that he was wilfully assaulted; and they might have awarded punitive damages in addition. On the other hand, it would appear that they must have taken the unauthorized view permitted by the court, in these instructions, that the injury was due to carelessness or negligence on the part of the defendant, and awarded much less than would have been proper if they acted upon the plaintiff's theory of the case, and much more than would have been proper, if they had believed the defendant's story.

Inasmuch as the jury were thus improperly instructed, we are unable to determine what weight they gave to the testimony which was properly before them, but we are satisfied that their verdict is not properly responsive to the evidence and should be set aside.

The exceptions to the charge of the court as above set forth are therefore sustained, and the case is remitted

to the Superior Court, with direction to grant a new trial.

George W. Bennett, Jr., for plaintiff.

Harold S. James, James J. McGovern, for defendant.

WILLIAM F. GALVIN vs. RHODE ISLAND CO.

MAY 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst and Sweetland, JJ.

(1) *Street Railroads. Negligence. Rear End Collisions. Pleading*

A declaration which alleges that a car of defendant was moving in the same direction as the wagon in which plaintiff was being carried as a passenger; that plaintiff was in the exercise of due care; that he had no control over the driver of the wagon; that without any notice or warning defendant operated its car so negligently that it struck the wagon and threw plaintiff therefrom, injuring him, shows with sufficient clearness a rear end collision brought about by the negligence of defendant without warning of approach under such circumstances as to preclude plaintiff from stating more facts regarding it, and sets forth a *prima facie* case of actionable negligence. Whether plaintiff is obliged to negative by allegation and proof the negligence of the driver of the wagon is not decided.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and sustained.

PARKHURST, J. This is an action of the case for negligence brought by William F. Galvin against the defendant company for injuries received on Main street, in Pawtucket, on the twelfth day of August, A. D. 1910, about ten o'clock P. M.

The plaintiff, as alleged in the declaration, was riding as a passenger in an express wagon, driven by one Flora Gibbs, while the wagon was being driven in a northerly direction along Main street, the defendant company, by its servants, ran one of its cars along said Main street in a northerly direction after the wagon at high speed so that the car overtook and collided with the wagon in a violent

rear-end collision, throwing the plaintiff to the street, and causing the injuries complained of in the declaration.

In the Superior Court the defendant demurred to the declaration on the following grounds:

"1. That it does not appear in and by said plaintiff's declaration in what the alleged negligence of said defendant consists.

"2. That it does not appear in and by said declaration that said defendant was guilty of any negligence whatever."

This demurrer was heard before Mr. Justice Tanner, October 24th, 1911, and sustained.

The plaintiff duly excepted to the ruling sustaining the demurrer, and has alleged such ruling as error prejudicial to him in his bill of exceptions thereafter duly allowed. The case is now before this court upon said bill of exceptions, this being the only exception in the case.

- (1) The demurrer raises the sole question—whether the declaration clearly and specifically points out actionable negligence on the part of the defendant. The second question suggested upon the plaintiff's brief, whether, as the declaration shows that the plaintiff was riding as a passenger in the wagon which was struck by the defendant's car, he is or is not obliged to negative, by allegation and proof, the negligence of the driver of the wagon, is not raised by the demurrer and will not be considered by this court.

The declaration, in our opinion, shows, with sufficient clearness, negligence upon the part of the defendant in that its motorman, without notice or warning, drove its car into a rear-end collision with the wagon in which the plaintiff was a passenger.

The essential allegations of the declaration are: "The defendant company was the owner . . . of certain rails and railway tracks then and there laid; to wit, in Main street, a public highway in said Pawtucket, and was then and there the owner . . . of certain electric cars . . .

then and there operated over and along said rails and tracks laid in said Main street . . . And the plaintiff avers that, to wit, on the day and date aforesaid, *he was then and there in the exercise of due care upon his part all the while and was then and there carried as a passenger in a certain wagon then and there driven by, to wit, said Flora Gibbons, over which driver the plaintiff avers he had no control . . .* and which said wagon was then and there being driven in a northerly direction along said Main street, to wit, near the junction therewith of Pawtucket avenue (another public highway in said Pawtucket), when suddenly, *without any notice or warning*, the defendant operated one of its said cars over its rails and tracks along said Main street, approaching from the rear the wagon in which the plaintiff was riding; and said defendant so negligently managed, operated and controlled said car that the same struck and collided with said wagon so that the same was broken and demolished and the plaintiff was thrown therefrom with great force and violence," etc.

Such averments have frequently been held by this court to constitute sufficient allegations of negligence in the defendant.

The charge of negligence in the declaration briefly stated is that the car of the defendant company, moving in the same direction as the wagon in which the plaintiff was riding, overtook the wagon without giving notice or warning of its approach and collided with the wagon.

In the case of *Parker v. Prov. & Stonington S. Co.*, 17 R. I. 376, upon demurrer to a declaration in trespass on the case for negligence in a collision of vessels on the public waters of the State, the rules in relation to the necessary allegations of the declaration are set forth as follows:

"May 29, 1891. *Per Curiam*. The court is of opinion that the declaration sufficiently states a cause of action, by setting forth that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sank the vessel of the plaintiff's testator.

This is the usual form of charging negligence in cases of highway collisions. The essential facts with reference to negligence are, *first*, plaintiff's right to the highway; *second*, in the exercise of due care; and *third*, defendant's interference with plaintiff's right by running into him. The defendant objects to this declaration upon the ground that it does not state in what the negligence consisted, and so does not inform him of the particular case he is called upon to answer, nor sufficiently protect him for the future in case of judgment. Undoubtedly a full statement to this extent is generally necessary, for in most cases there would be no case stated without it. Negligence consists in omitting to do a duty, or in doing it so carelessly as to bring injury to another. Ordinarily, therefore, unless the particular duty and its breach are set forth in the declaration, no negligence appears. These are the backbone of the declaration, without which it cannot stand.

"The details which prove the negligence need not be set forth, but there must be an averment of facts showing the duty and the general manner of its breach, or else no case is stated. But in collisions the force and injury are direct and, except where the injury is caused by the carelessness of a servant, an action of trespass may generally be maintained, in which the averment of the force alone would be sufficient. I Chitty on Pleading, *127, 2 Ib. *713, *860. In collisions, it is almost impossible to do more than state the fact that, while upon a highway, in the exercise of due care, the plaintiff was run into by the defendant. This raises a presumption of negligence, nothing appearing to the contrary, because of the defendant's control of the agent of the injury, and because such accidents do not occur without negligence. The plaintiff can seldom know or state just how it was done, whether by carelessness in one way or another, or even by design.

"In the case at bar, the plaintiff can neither be expected nor required to state in what particular way the defendant's servants on another boat were negligent. It is enough to

state facts which naturally or necessarily raise a presumption of negligence."

And to the same effect, following the last cited case, is *Goldrick v. Union R. R. Co.*, 20 R. I. 128. In both of these cases the allegations of the declarations were essentially similar to those in the case at bar, where there is a collision alleged, with sufficient clearness to show that it was a rear-end collision, brought about by the negligence of the defendant without warning of approach, under such circumstances as to preclude the plaintiff from stating more facts regarding it than appear upon the face of the declaration.

Reference is also made to the following cases, where upon proof of a state of facts, similar to those alleged in this declaration, relating to rear-end collisions, this court held such facts, as proved, to be sufficient evidence of negligence.

In the case of *Pawtucket Baking Company v. The R. I. Co.*, 32 R. I. 517, 519, this court held that a motorman who drives his car into a rear-end collision with a wagon upon the highway, without warning or notice of its approach was guilty of a reckless act; speaking through Mr. Justice Blodgett, the opinion holds as follows: "Inasmuch as the defendant offered no defence we thus have presented affirmative testimony showing that the defendant's car collided with the rear of the plaintiff's covered wagon while being driven on the car track at about 9.30 P. M., and that no bell was rung to give warning of the approaching car. The record is silent as to whether the plaintiff looked or did not look to the rear for approaching cars, as it is silent as to the rate of speed of the car at the street crossing in question, the distance from the wagon at which the motorman first saw the wagon on this unbroken stretch of straight track of a quarter of a mile, as also it fails to show that the motorman made any, even the slightest, effort to stop the car at any time or even whether his headlight was burning or not. So far as appears from this record in which the defendant has not seen fit to offer any explanation of the cause of the

accident, it appears to have been a reckless act of the motor-man in simply running down, from the rear, the plaintiff's wagon which was lawfully on the highway at that time and place, without notice or warning of any kind."

In *Dyer v. Union Railroad Co.*, 25 R. I. 222, this court in considering a rear-end collision said, "but a consideration of the evidence shows that the negligence of the defendant was so clearly established that a new trial would be of no avail, since it clearly appears that the plaintiff was overtaken from the rear by the car of the defendant company, which was then running at a high and excessive rate of speed."

While in the case at bar, there is no allegation with reference to the rate of speed at which the car was running, there is an allegation that the "defendant so negligently managed, operated and controlled said car that the same struck and collided with said wagon," etc.

We are of the opinion that the declaration clearly and sufficiently sets forth a *prima facie* case of actionable negligence, and that the Superior Court erred in sustaining the demurrer. The plaintiff's exception is therefore sustained, and the case is remitted to the Superior Court, with direction to enter its order overruling the demurrer and for further proceedings.

John W. Hogan, Philip S. Knauer, for plaintiff.

Joseph C. Sweeney, G. Frederick Frost, for defendant.

EDWARD H. ZIEGLER, Trustee, vs. RACHEL A.
THAYER.

MAY 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Bankrupt Act. Insolvency. Fair Valuation.*

Under the provisions of the federal bankruptcy act, Section 1, subdivision 15, insolvency turns on what is a fair valuation of the property; hence in a

proceeding to set aside a transfer brought by a trustee in bankruptcy, evidence offered by the bankrupt as to the value of his property "to him" was properly excluded.

(2) *Bankrupt Act. Insolvency. Fair Valuation.*

Fair valuation of property within the contemplation of the bankrupt act relative to insolvency of the alleged bankrupt would be the present market value, rather than the value to the bankrupt or the value of such property at a forced sale.

(3) *Bankrupt Act. Preferences.*

Transfers of a bankrupt's property within the four months period, which would be voidable as a preference, cannot be rendered valid, by reason of a parol agreement for security made prior to the commencement of said period.

(4) *Bankrupt Act. Preferences. Mortgages. Record.*

The federal bankruptcy act, Section 67, clause "a," provides "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

Gen. Laws, 1909, cap. 258, § 10, provides that no mortgage of personal property shall be valid except as between the parties, unless possession is taken or it is recorded in accordance with the statute within five days of its date:—*Held*, that as a mortgage would not have availed as against creditors unless recorded in accordance with the statute, a parol agreement to give security was without effect.

BILL IN EQUITY. Heard on appeal of respondent, and dismissed.

JOHNSON, J. This cause is before this court on appeal from a decree of the Superior Court in a cause in equity wherein the complainant as trustee in bankruptcy of the estate of Chester A. Thayer prayed that a certain chattel mortgage and a deed of assignment of certain book accounts from the said Chester A. Thayer to the respondent, his wife, be set aside and the respondent ordered to deliver to the complainant all books, papers and ledger cards and all other evidences of existence of said rights and credits and choses in action assigned to her as aforesaid, now in her hands and possession.

The answer of the respondent admits that she is the wife of said Chester A. Thayer; that on the 18th day of Novem-

ber, 1910, the said Chester A. Thayer was duly adjudged a bankrupt by the District Court of the United States for the State of Rhode Island on an involuntary petition by his creditors, dated October 3d, 1910, and duly filed in said court; that the complainant was duly elected trustee of the said bankrupt estate of said Chester A. Thayer by his creditors on the 13th day of January, 1911, that he has duly qualified as such trustee and has entered upon the execution of the duties of said trust; that on the 17th day of September, 1910, said Chester A. Thayer conveyed by chattel mortgage to said respondent certain goods and chattels described in said mortgage as of the value of \$1,000; that said conveyance was made to secure the payment of the sum of \$900 and was duly recorded as required by law; that on said 17th day of September the said Chester A. Thayer by deed of assignment assigned to said respondent certain rights and credits and choses in action due to him from various parties fully listed and described in said deed of assignment of the face value of \$3,000 to further secure said respondent for moneys which the respondent alleges and claims that her husband, said Chester A. Thayer, was owing to her at the date of said assignment and of said chattel mortgage.

Said respondent admits that she has in her possession the books, papers and ledger cards containing the accounts of persons, firms and corporations indebted to said Chester A. Thayer at the date of the assignment of said accounts to the respondent.

Said respondent denies the following allegations in the bill of complaint:

"Sixth: That there was no consideration for said mortgage and deed of assignment moving and passing at the time of the delivery of said papers by the said Chester A. Thayer to the respondent, from said respondent to said Chester A. Thayer; and the only consideration for said transaction was an alleged pre-existing debt due and owing to the respondent by said Chester A. Thayer.

"Seventh: That by said chattel mortgage and deed of

assignment said Chester A. Thayer conveyed and mortgaged to the respondent the whole of his estate of which he was then seized and possessed, except certain household effects which were exempt from attachment.

"Eighth: That at the date of the delivery of said mortgage and assignment to the respondent by said Chester A. Thayer the said Chester A. Thayer was involved in debt to a large amount to wit: to the amount of several thousand besides the alleged indebtedness to the respondent; he was then insolvent and unable to pay his creditors; and said conveyances are inequitable and a fraud upon his other creditors and were made to defraud his general creditors and to prefer his said wife as an alleged creditor over his other and general creditors."

And said respondent further answering denies the allegations made in said bill that said Thayer did convey as alleged the whole of his estate and denies that said Thayer was insolvent at the time of the alleged transfer.

Said cause was heard in the Superior Court April 10, 1911, upon bill, answer and proof and on April 12, 1911, a decree was entered "that said chattel mortgage dated the 17th day of September, A. D. 1910; and said deed of assignment of the same date, given by said Chester A. Thayer to Rachael A. Thayer, be, and the same hereby are, set aside; and that the respondent be and she is hereby ordered to deliver to the petitioner, all books, papers and ledger cards, and evidences of said choses in action, assigned by said Chester A. Thayer to her the said Rachel A. Thayer as aforesaid; and that the respondent be and she is hereby ordered to account to the petitioner for all moneys collected by her or by her agent or attorney on account of any of said rights and credits."

From this decree the respondent appealed, assigning as reasons therefor: "First, because said decree is wrong and erroneous in law and ought to be reversed and rendered in favor of the respondent. Second, because said decree is wrong in fact. Third, because said decree is against the law.

Fourth, because said decree is against the evidence and the weight thereof. Fifth, because said Superior Court erred in not admitting certain evidence going to show the solvency of Chester A. Thayer. Sixth, because said Superior Court erred in not finding that there was present and adequate consideration for the transfer of property and assignment of accounts to said Rachel A. Thayer."

- (1) Upon the evidence allowed by the justice of the Superior Court, Chester A. Thayer was clearly insolvent upon September 17, 1910, the date of the mortgage and assignment to his wife. Respondent's counsel admits this, but claims that the justice erred in ruling out evidence, which he says would have proved Thayer to have been solvent upon said date.

After testifying that on the date of the mortgage and assignment he owed less money than his schedules show as liabilities, Mr. Thayer was asked certain questions by counsel for respondent. On page 36 the record reads: "Q. 3. Was the value of your tangible property on the date of the transfer to your wife, the value to you— THE COURT: 'The value to him.' Q. 4. Was the value of his tangible property, was the value to him not to others, was the value to him larger or smaller than your schedule value of the same property. THE COURT: Why do you put the question in that way? MR. CRANE: The purpose is this: The value of property to Mr. Thayer might be much more than it would be to me, or at the auction value, or to others. In arriving at a fair value of his property, the decisions are that he can put such value as is fair under the circumstances, not having in view an auction sale or a forced sale. THE COURT: That might be the rule as to market price rather than the value to him. He might have some very exaggerated opinion. It might be a very peculiar value to him. You cannot fix values that way." Questions followed asking the value *to him* to use in his business of his automobile; of the plans and specifications spoken of in the mortgage; of the accounts receivable; of his household furniture, and of his wearing apparel. Question 14, was as

follows: "Did some of your property have a working value to you which would give you an income from the use of it, a larger income, larger than the average man, or the average purchaser of such property would get from the use of the same property after the same manner?" All the above questions were ruled out. Their exclusion was proper. The value of the property to Thayer was not the proper test of fair valuation. Insolvency is defined in Section 1, subdivision 15 of the bankruptcy act, as follows: "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Insolvency under the definition contained in this section turns on what is a fair valuation of the property. *In re Gilbert*, 112 Fed. 951. Fair valuation has been held to be the present market value, and not the amount which might be realized from a forced sale of the property, *Duncan v. Landis*, 106 Fed. 839.

- (2) It has been held that the valuation for the test of solvency or insolvency upon an issue as to whether a chattel mortgage was preferential, must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy has intervened. *Butler Paper Co. v. Goembel*, 143 Fed. 295.

In the case of *In re Hines*, 144 Fed. 142, the court, in considering what constitutes a fair valuation, said: "As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market valuation: that is, what the property will probably bring, or is worth, in the general market to-day, where everybody buys. It could not be what it is worth to one person or to another under special circumstances, or having special use for a particular article, but what it is worth as a marketable commodity at a

given time with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale."

The mortgage and transfer were given to secure the claim of Rachel A. Thayer for money advanced to Chester A. Thayer at various times from May to August, 1910, amounting in all to \$1,400.

Rachel A. Thayer testified: "Q. 5. What was the entire, the agreement between you and him as to these loans and security? Ans. It was agreed that I should give him money from time to time up to a certain amount, and that he would give me security for the same." She testified that he did not give her any notes for any of these loans and that she kept account of them on a piece of paper; that each time she gave him any she would add that to the other.

It is not claimed that any consideration passed on the date of the execution of the mortgage and transfer. Chester A. Thayer testified: "Q. 62. Your wife loaned you certain money? Ans. Yes, sir. Q. 63. According to the testimony here of the preceding witness? Ans. Yes, sir. Q. 64. Was there or was there not an agreement with her, with regard to giving security? Ans. There was. Q. 66. What was that agreement? Ans. That I was to give her security for money that she loaned me. Q. 67. Give the details of your entire agreement with her? Ans. She advanced me money at different times and I was to give her security for the amount of money that she had advanced me. Q. 68. Were there any notes given, up to the time of the giving of the security? Ans. No, sir. Q. 69. Was your agreement as to giving security carried out on the 17th of September? Ans. It was."

- (3) We cannot believe that while transfers of the bankrupt's property made within the period of four months before the bankruptcy may be avoided, such transfers can be rendered valid by reason of a parol agreement made prior to the commencement of said period. As the court said *In re Dismal Swamp Contracting Co.*, 135 Fed. 415, 417: "Once let it be

understood that conveyances made within four months of bankruptcy can be successfully attacked, while those made in pursuance of a pre-existing bona fide agreement will be upheld, and the entire policy of the bankrupt law, in so far as it undertakes to specify the time within which preferences can and cannot be assailed, will be frustrated and destroyed. The door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors. A condition, alike destructive of the interests of creditors and bankrupts, would be brought about, and a harvest for dishonest debtors afforded. The debtors knowing the circumstances under which they make the preferences, their general creditors to be affected thereby would be entirely at their mercy."

In the case of *In re Ronk*, 111 Fed. 154, the court, p. 156, said: "It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors; and, if it did not create a valid lien, then, by the terms of the bankruptcy act, it cannot be enforced as a lien entitled to priority over other claims. It created no lien,—nothing but a secret equity, possibly good as between mother and son, but certainly not valid and enforceable to the prejudice of the claims of creditors. The bankruptcy act embraces payments for the purpose of giving preferences, as well as the giving of securities for such purpose; and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed at the time it was contracted to pay the debt, without defalcation, on a specified day. The doctrine contended for by the mortgagee would necessarily invite and inevitably lead to the defeat of the bankruptcy act. It would be easy in every case where it was desired to thwart the operation of the law and to give a preference to a relative or a friend to make an agreement at the time the money was loaned or the credit given for a mortgage to be executed in the future. If the law can be thus evaded, it would be an open invitation to every person loan-

ing money or giving credit to the bankrupt to enter into such a verbal agreement with him. Such agreements, if held valid, would create secret liens upon the bankrupt's property, and would enable him in every case to effect the very objects which it was the purpose of the bankruptcy act to prevent. Such agreements would undoubtedly be made in every case where the debtor wished to secure relatives and friends to the detriment of his other creditors."

- (4) The assignment as well as the mortgage is claimed to have been made as security for the prior loans. Gen. Laws, R. I. 1909, cap. 258, § 10, provides: "No mortgage of personal property hereafter made shall be valid as to the assignee in insolvency of the mortgagor, or any other person except the parties thereto and their executors and administrators, until possession of the mortgaged property be delivered to and retained by the mortgagee, or the said mortgage be recorded in the records of mortgages of personal property in the town or city where the mortgagor shall reside, if in this state; and if not in this state, then in the town where the property is at the time of making said mortgage; which said recording or taking and retention of possession as aforesaid shall be made or taken within five days from the date of the signing thereof. . . ." A mortgage given at the time of the loan would not have availed against other creditors of Chester A. Thayer unless recorded in accordance with said statute. A parol agreement to give security, could certainly have had no greater effect than a mortgage actually given, but not recorded as required by the statute. In *re Ronk*, *supra*, the court cited a statute of Indiana, the case having arisen in said state, as follows: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof," and said: "If the mort-

gage had been executed on November 14, 1900, and had not been recorded until March 29, 1901, manifestly it would have been invalid as against creditors. It is difficult to perceive how, in view of this statute, a secret claim or equity can be held to have been created by the verbal agreement, when a mortgage or assignment actually executed by the parties at the time, if unrecorded, would have been invalid as against creditors. It is apparent that it was the purpose of the legislature to allow no valid claim, lien, or secret equity to be created on goods unless public disclosure was made either by delivery of the goods to the assignee or mortgagee and the retention thereof by him, or by recording the assignment or mortgage within 10 days. To hold otherwise would be to defeat the beneficial effect of the recording statute." Section 67, clause "a" of the bankruptcy act provides: "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

The Superior Court did not err in not finding that there was present and adequate consideration for the transfer of property and assignment of accounts to said Rachel A. Thayer.

The appeal is dismissed. The decree below is affirmed and the cause is remanded to the Superior Court for further proceedings.

Washington R. Prescott, for complainant.

Mendell W. Crane, for respondent.

JAMES H. CARNEY *et al.*, vs. JOHN B. HAWKINS, Ex'r.

MAY 27, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Probate Law. Account of Executor. Evidence.*

On a probate appeal from the allowance of an account of an executor, the only evidence submitted was offered by the appellants and only as to certain

of the items objected to. While the account of the executor sworn to was submitted it did not appear that the account was submitted by or sworn to by him in court, or that the executor was present so that he could be cross-examined, nor that the appellants consented to the admission of the account as *prima facie* evidence, and waived proof of the items of the account:—

Held, that the procedure was irregular, since the mere presentation of the account from the Probate Court was not evidence of the correctness or propriety of the items, and should not have been accepted by the court except by stipulation of the parties, and in allowing the items the court acted without evidence and so without authority.

(2) *Probate Law. Account of Executor. Appeal. Procedure.*

Under rule 14 (law rules) of the Superior Court, on appeal from an account of an executor or administrator, the administrator or executor who presented the account in the Probate Court is "the party holding the affirmative" and should proceed to present the account and vouchers or other evidence in support of the items as to which appeal is claimed, at the outset, otherwise there is no evidence as to which appellants are required to offer any testimony.

(3) *Probate Law. Account of Executor.*

Where it appears that an execution settled by an executor was on a personal judgment against himself and not against the estate, the item is properly disallowed.

(4) *Probate Law. Amendment. Actions.*

After disallowance of a claim filed in a Probate Court, claimant brought suit against the executor personally, and more than a year after notice of such disallowance, by agreement of parties the writ and declaration were amended so as to make it a suit against the estate:—

Held, that the attempted amendment of the suit was in legal effect the institution of a new suit against the executor after the statutory period of limitations of six months, under C. P. A., § 891, had taken effect, and the payment of a judgment on such action by the executor should be disallowed.

(5) *Probate Law. Special Statute of Limitations. Waiver.*

A claim against an estate of a decedent is absolutely extinguished by the special statute of limitations if not sued within six months after notice of disallowance; this cannot be waived by the executor, and if he attempts to do so the court will, on its own motion, apply the rule of the statute.

(6) *Amendment. Pleading.*

Amendments permitted by statute to pleadings do not include such amendment as would make one suit into another of a different form or for a different cause of action.

PROBATE APPEAL. Heard on exceptions of appellant, and sustained.

PARKHURST, J. This case is a probate appeal from the Probate Court of the city of Central Falls, which was taken by the appellants as residuary devisees under the will of James Gilbane, from the allowance of the account of Hawkins, Executor, by said probate court, and the reasons of appeal specify the items intended to be contested, as follows, viz.:

Paid on execution in case of John J. Gilbane....	\$77 20
Paid in settlement of case of Margaret Gilbane v.	
Estate.....	500 00
E. DeV. O'Connor, Atty. fees.....	600 00
Retained for services.....	214 00
Monument erected in cemetery.....	350 00

After hearing of this appeal before a justice of the Superior Court, without a jury, jury trial having been waived, the justice allowed all of the contested items except that one specified as "Paid on Execution in case of John J. Gilbane, \$77.20," which was disallowed.

- (1) The appellants excepted to this decision and the case is now before this court upon the bill of exceptions. The decision of the justice states that "His account, sworn to, is submitted by the executor. There was no cross-examination of him by the appellants." But the transcript of testimony does not show that the executor was present in court, or that the account was submitted by him or sworn to by him in court; or that he was present at any time before the court so that he could be subjected to cross-examination. The only evidence submitted was offered by the appellants and consisted of certain papers in several prior suits and proceedings relating to the charges for amounts paid to John J. Gilbane for \$77.20, and to Margaret Gilbane for \$500. No evidence was offered by the appellants as to the other items of the account, set forth in the reasons of appeal. Nor does it appear upon the transcript, that the appellants formally consented to the introduction and admission of the account sworn to by the executor, as *prima facie* evi-

dence of the correctness and propriety of the items therein charged, and waived the proof of the items of the account, as to which they had taken their appeal. This procedure was highly irregular. The mere presentation of a copy of the sworn account of the executor, produced with other papers from the probate court, as a part of the record of the probate court, to show what the appeal relates to, is not evidence of the propriety and correctness of the items of the account, and should not have been accepted as such by the trial judge, unless expressly stipulated by the parties. Upon appeal from a decree allowing an administrator's or executor's account by the probate court, the administrator or executor, who presented the account for allowance (2) in the probate court, is "the party holding the affirmative" under Rule 14 (law rules) of the Superior Court, and should proceed in due form at the outset to present his account and the vouchers showing his expenditures, or other evidence in support of the items of the account as to which the appeal is claimed, so that the court may at the outset have evidence before it as to the contested items. Unless this procedure is followed, there is no evidence before the court upon which it can act as to the allowance or disallowance of the contested items, or upon which the appellants are required to offer any testimony (unless by stipulation as above referred to, which in this case there is nothing to show).

We find, therefore, in this case, that the record does not show that the appeal was ever properly presented to the trial judge, or that there was any evidence before him as to the last three items of the account above set forth showing whether or not the several sums of \$600, \$214, or \$350 had been actually expended, or as to the propriety of the same as credits to the account. So that we find that, when the trial judge allowed these items, as he did in his decision, he acted without evidence, and so without authority; and as to the allowance of these items, therefore, we sustain the appellants' exception to his decision.

As to the other items in dispute, the transcript does show

- that evidence was offered by the appellants, upon which the trial judge could and did act. The item, "Paid on execution in case of John J. Gilbane, \$77.20," appears to have been based upon a judgment of the District Court, and an inspection of the papers presented and referred to in the transcript shows that the judgment upon which the execution was issued was a personal judgment against said Hawkins, and not a judgment against the estate of James Gilbane, and so the same was properly disallowed. As to the claim of Margaret Gilbane, evidence also appears fully showing the basis of the claim and the proceeding relative thereto, and as to this claim we think the evidence was sufficient to warrant the trial judge in considering the same and making a finding thereon.
- (3) As to this claim of Margaret Gilbane, it has been before this court, in two prior proceedings (*Gilbane v. Hawkins*, 29 R. I. 502; *Carney v. Superior Court*, 30 R. I. 276). From these cases it appears that Margaret Gilbane filed her claim against the estate of James Gilbane in the probate clerk's office seasonably after the death of James Gilbane, for the sum of \$768; that these appellants objected to the allowance of the claim, and the same was disallowed by the executor; that thereafter suit was brought by Margaret Gilbane, in the District Court, for the sum of \$500, remitting \$268, and that the appellants attempted to defend this suit by consent of the executor, and by their attorney in the District Court, did in the name of John B. Hawkins, claim a jury trial and the case was certified to the Superior Court upon such claim. After it got there, Hawkins submitted to judgment for \$500, and the case was brought to this court upon exceptions alleged by these appellants, claiming the right to defend said suit. Upon examination of the papers in this court it was found that the action was brought against the defendant Hawkins personally, since it appears in the writ and declaration that the plaintiff declares against Hawkins on a contract of indebtedness and a promise by him only, without any allegation to show that it was originally an
- (4)

indebtedness of the deceased James Gilbane; and for that reason, because the judgment was not against the estate, the devisees under the will of Gilbane had no interest in it, and their proceedings to set it aside were dismissed. (*Gilbane v. Hawkins*, 29 R. I. 502.) Subsequently when the same suit had been remitted to the Superior Court, the parties on May 19, 1909, attempted to so amend the suit as to make it a suit against the estate of James Gilbane, by agreement signed by attorneys and filed in the Superior Court, whereby the former judgment was vacated, and the writ and declaration were amended; and, on May 21, 1909, the attorneys filed an agreement in said Superior Court, whereby defendant, as executor under the will of James Gilbane, submitted to judgment for plaintiff for \$500, upon the amended writ and declaration.

It is to be noted that the claim of Margaret Gilbane was disallowed by the executor May 7, 1908, and she was notified of such disallowance on the same day. So that it appears that more than a year elapsed, before the writ and declaration were so amended, as above set forth, as to appear on their face to be an action against the estate.

It is the opinion of this court, that, under the circumstances as above set forth, the amendment above set forth, whereby a suit, originally commenced against Hawkins individually, was, after more than a year from the notice of disallowance of the claim, converted into an action against the estate, was invalid. The provision of law applicable to a suit on a disallowed claim against an estate, at the time this suit was brought is found in the Court and Practice Act, as follows: "Sec. 891. If the estate is solvent, and commissioners are not appointed, suit must be brought on a disallowed claim within six months after notice is given to the creditor that the same is disallowed; and unless otherwise authorized, suit on such claims shall not be brought thereafter against the executor or administrator." It is manifest that the original suit brought by Margaret Gilbane against John B. Hawkins, being a suit against Hawkins personally

and not against the estate of James Gilbane, was not a suit brought within six months after notice of disallowance in contemplation of the statute above quoted. And it is equally clear that the attempted amendment of the suit as above set forth was, in legal effect, the institution of an entirely new suit against the executor, after the statute of limitations had taken effect.

The action in which judgment has been entered against the executor of the will of appellants' testator was not instituted within six months after notice to claimant of disallowance of the claim, and is therefore null and void under the special statute of limitations.

- (5) A claim against the estate of a deceased person is absolutely extinguished by the special statute of limitations if not sued within six months after notice of disallowance of the claim. *Kenyon v. Prob. Court*, 27 R. I. 566; *Thompson v. Hoxsie*, 25 R. I. 377; *Mason v. Taft*, 23 R. I. 388. The executor cannot waive the special statute of limitations, and when he attempts to do so the court will, on its own motion, upon discovering the fact, apply the rule of the statute. *Kenyon v. Prob. Court*, *supra*; *Thompson v. Hoxsie*, *supra*.

- (6) It has frequently been decided by this court that the amendments permitted by our statute, do not include such amendment as would make one suit into another suit of a different form or for a different cause of action. *Wilcox v. Sherman*, 2 R. I. 540; *Thayer v. Farrell*, 11 R. I. 305; *Barnes v. Mowry*, 11 R. I. 420; *Dowling v. Clarke*, 13 R. I. 650; *Viall v. Town Council*, 18 R. I. 405.

We are of the opinion that the suit as it was finally amended by authority of the Superior Court, was a suit for a different cause of action against a party not the defendant in the original suit, and that the attempted amendment was a nullity, and therefore that the judgment rendered thereon was a nullity as against the estate of James Gilbane; that therefore the executor was not authorized to pay such judgment, and that this item in his account should have been disallowed by the Superior Court.

The appellants' exception, to the decision of the trial judge, is therefore sustained; and the case is remitted to the Superior Court for a new trial, as to all the contested items of the account, except as to the item of \$77.20 which was disallowed, and except also as to the item of \$500 paid in settlement of case of Margaret Gilbane, as to which it is ordered that the same be disallowed.

Edward M. Sullivan, for appellants.

Hugh J. Carroll, for appellee.

WILLIAM D. SOWTER vs. SEEKONK LACE COMPANY.

JUNE 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Corporations. Directors. Ultra Vires.*

An agreement of a board of directors of a corporation attempting to bind the corporation and stockholders as to the membership of the board of directors is *ultra vires*.

(2) *Pleading. Demurrer. Surplusage.*

In an action of covenant an allegation of the breach of an *ultra vires* portion of an agreement between the parties does not render the count demurrable where it alleges another breach of the agreement which constitutes a good cause of action, but it should be treated as surplusage.

(3) *Pleading. Demurrer. Surplusage.*

In an action of covenant for breach of an agreement under seal, the fact that the agreement set out in the declaration, does not contain a covenant, the breach of which is alleged, does not render the count demurrable, but the matter is surplusage, as is also the irrelevant recital of another agreement between plaintiff and third persons, where disregarding all immaterial matters there still remains allegations of a good cause of action.

(4) *Pleading. Redundancy.*

Counts which do not differ substantially from one another are open to the objection of redundancy, but this cannot be reached by demurrer.

(5) *Pleading. Demurrers. Setting out Evidence.*

A declaration for breach of covenant to employ alleging loss of other opportunities, is not demurrable for not setting out what were the opportunities; with what persons and for what compensation, since a pleader is not required to set out his evidence.

(6) *Pleading. Demurrers.*

Where a declaration alleges several elements of damage, the failure to allege properly one of the items will not render the count demurrable.

(7) *Pleading. Joinder of Actions.*

In an action of covenant, a plaintiff may join all the different causes of action which can be prosecuted under this form of action, at common law.

(8) *Pleading. Joinder of Actions. Doubt.*

In an action of covenant plaintiff joined two counts in covenant under a sealed agreement with one in the general form of a count in *assumpsit*, upon an independent cause of action, arising out of a different matter, and he did not join any other count in covenant based upon the same matter.

Held, that, under Gen. Laws, 1909, cap. 283, § 26, plaintiff could properly join the counts, and was not required to disclose either the existence of or the reasonableness of his doubt as to the form of action, but his conclusion that it existed was controlling.

Decision in *Adams v. Lorraine Co.*, 29 R. I. 333, that the intent of Gen. Laws, 1909, cap. 283, § 26, as to joinder of counts in various forms of action, where plaintiff is in doubt as to the proper action, is to do away with the distinction between certain forms, so far as the adequacy of the writ to support counts in either form is concerned, affirmed.

VINCENT, J., dissents.

COVENANT. Heard on exceptions of plaintiff and sustained.

SWEETLAND, J. This case is before us upon the plaintiff's exceptions to the ruling of a justice of the Superior Court sustaining the defendant's demurrer to the declaration and to the several counts thereof.

The form of action as stated in the writ is covenant. The declaration contains three counts. In the first count the plaintiff alleges that he entered into an agreement with the defendant which was sealed with their respective seals; that this sealed instrument provided among other things that the plaintiff should serve the defendant faithfully as general manager and superintendent of its business for the term of four years from and after January 1st, 1910; that the plaintiff should be a member of the board of directors of the defendant company during said term; that the defendant company should erect and equip a mill suitable for its business and furnish sufficient capital for its operation;

- that the defendant should pay the plaintiff thirty-five dollars each week during said term, and further that the defendant should credit a certain percentage of its net earnings upon the account of the plaintiff in payment for certain shares of the capital stock of the defendant, which were to be issued to
- (1) the plaintiff; the declaration further alleges that the plaintiff kept and performed all the covenants in said agreement to be by him performed; but that the defendant has not performed its covenants under said agreement, and among other things, that the defendant, before the end of said term of four years, has forced the plaintiff to leave its service and has removed him from and out of its board of directors.

The defendant demurs to this count on the ground that said alleged agreement under seal is *ultra vires* so far as it relates to the covenant of the defendant that the plaintiff should be a member of the board of directors of the defendant during the term of the agreement; and that said agreement in this particular is void and of no binding effect.

- We are of the opinion that the defendant's criticism of the agreement in this regard is justified. Said covenant, in the particular named, is without effect. The board of directors of the defendant in authorizing the said agreement was
- (2) without power to bind the corporation and the stockholders as to the membership of the board of directors. The allegation of this breach of the agreement by the defendant however does not render the count demurrable. It should be treated as surplusage and does not vitiate the count. The count alleges another breach of the agreement which constitutes a good cause of action, and to which no objection has been made. The defect complained of, therefore, cannot be reached by demurrer.

The second count of the declaration alleges, among other things, that the plaintiff was skilled in the manufacture of laces and like goods; that previous to the making of said agreement under seal, recited in the first count, he entered into the service of certain persons, in the second count named, as their agent in making preparation for the establishment of

the business of lace making in the city of Pawtucket; that in consideration of his said services the persons named in said count promised the plaintiff that they would organize a corporation for carrying on said business, and that said corporation would compensate him for all services rendered as aforesaid previous to the formation of said corporation; that said persons with the assistance of the plaintiff procured the organization of the defendant corporation; that after its organization "the defendant then and there in consideration of the services so rendered by the plaintiff as aforesaid and in consideration that the plaintiff would enter into its service as its general manager and superintendent assumed upon itself the obligation to pay the plaintiff for his aforesaid services;" and that the plaintiff and defendant entered into said sealed agreement. The second count further alleges that the plaintiff has kept and performed all his covenants contained in said agreement, but that the defendant has refused to keep its covenants in said agreement contained; that it has forced the plaintiff to leave its service, has removed him from its board of directors and has "refused to compensate him for his said services rendered as aforesaid prior to the said entering into said agreement under seal as aforesaid."

(3) The defendant has demurred to the second count on the grounds, among others, that the defendant's refusal to compensate the plaintiff for his services rendered prior to entering into said agreement under seal was no breach of the covenant set forth in the count; and that the covenant of the defendant that the plaintiff should be a member of the board of directors of the defendant company during the term named in the agreement was *ultra vires*. This count as well as the first count is open to the second objection named and the first objection is also well founded. The agreement under seal, set out in said count, contains no reference to the services performed by the plaintiff, for the persons named, prior to the sealed agreement, and said agreement under seal contains no covenant on the part of the defendant to com-

- pensate the plaintiff for the performance of any such service. However, as we have said above, with reference to the demurrer to the first count, such matter is mere surplusage; as is also the irrelevant recital of the agreement between the plaintiff and the third persons named in said count, and the performance of service by the plaintiff for said persons. The count is not thereby rendered demurrable. Disregarding all these immaterial matters contained in the second count there still remains the allegation of a good cause of action to which no objection has been made. The second count, therefore, is not demurrable on any of the grounds stated by the defendant. Relieved of its irrelevant matter the second count does not vary substantially, if at all, from the first count. It is therefore open to the objection of redundancy; but the defendant has not demurred to it on
- (4) that ground, nor can that objection be reached by demurrer; for if the second count is redundant the first is equally so; and it would be unjust to dismiss a plaintiff from court because he has stated the same good cause of action in two distinct counts. Since the parties are now advised as to the effect of these counts, in respect to the matters above considered, we see no embarrassment to the defendant if they both remain in the declaration. If, however, it is thought desirable to clear the record this cannot be done by demurrer, but in another form of procedure addressed to the discretion of the Superior Court.

In the third count of the declaration the plaintiff alleges, among other things, that he entered into the service of the defendant and performed certain work for the defendant at its request, from which employment he was later unreasonably discharged; and "that by reason of his entering into said services . . . he refused and lost a great many opportunities for entering into the service of other persons at highly remunerative compensation."

- (5) The defendant has demurred to this count on the ground that "it does not appear in and by said count what opportunities for entering into the service of other persons the

plaintiff refused and lost, and it does not appear who those persons were and what the remuneration would have been."

This does not set out a valid ground of demurrer. It is an elementary rule of procedure at law that evidence shall not be pleaded. If, as the defendant urges, the allegation in question is one of special damage, the requirement of correct pleading is, that the plaintiff shall specifically state the nature of his special damage; but it does not require him to set forth in his declaration the names of his witnesses or the evidence by which he hopes to establish such special damage. Furthermore, the plaintiff has alleged in this count other
(6) elements of damage, and whether or not he is mistaken as to the item of damage in question or if he has failed to allege it properly, nevertheless his action will not be defeated thereby.

In addition to the foregoing demurrers to the several counts of the declaration, the defendant has demurred to the whole declaration on the ground that "it appears in and by said declaration that the plaintiff had no reason to doubt whether his action should be in covenant or assumpsit, and the plaintiff has joined in one action counts in covenant and assumpsit."

(7) The form of the plaintiff's action being covenant the common law, unchanged in this regard by any statute of this State, permits him to join in his declaration all the different causes of action which he has against the defendant which can be prosecuted under this form of action. 1 Ency. Pl. & Pr. 164 and notes.

This being an undisputed common law rule of pleading there can be no question as to the right of the plaintiff, so far as relates to the matter now under consideration, to place the first two counts in his declaration; since they each set out a cause of action arising from the breach of the covenants of a sealed instrument. This can hardly be disputed whatever may be said in regard to the third count. It does not matter whether the first two counts set out causes of action arising from separate and independent matters or are variant statements of causes of action arising out of the

same transaction; and the plaintiff might have joined counts for other causes of action which he had against the defendant, provided such causes were recoverable in this form of action. The defendant's demurrer to the whole declaration, therefore, cannot be regarded as an objection to the first two counts, but must have been directed against the presence in the declaration of the third count. The third count is in the general form of a count in assumpsit. It does not appear to be intended as the statement of a claim arising under the sealed agreement recited in the first two counts; and, as far as the question of pleading is concerned, it is founded upon an entirely independent cause of action, arising out of a different matter. As far as appears it may in some manner be connected with some other specialty or it may arise on some writing as to which the plaintiff is uncertain whether or not it should be treated as a specialty. Hence the presence of the first two counts in the declaration may be disregarded in considering this demurrer. Being counts in covenant they are properly in a declaration in an action of covenant. The question raised by this demurrer is: had the plaintiff a right to place the third count in his declaration in an action in form covenant?

The plaintiff relies upon Section 26, Chapter 283, Gen. Laws, 1909. This section is as follows: "When a plaintiff has reason to doubt whether his action should be in covenant debt, or assumpsit, he may bring either action and may join therein counts in covenant, debt, and assumpsit, or any of them, and when he has reason to doubt whether the action should be trespass or trespass on the case, he may bring either action and join therein counts in trespass and trespass on the case, or either of them, and the defendant in all such cases shall plead to the several counts according to the practice at common law, and judgment may be entered upon the counts under which the plaintiff may be entitled to recover."

This court has considered that section in *Adams v. Lorraine Mfg. Co.*, 29 R. I. 333, in regard to actions of trespass and trespass on the case; concerning which actions the

section makes provision similar to that regarding the actions of covenant, debt and assumpsit. In *Adams v. Lorraine Mfg. Co.*, *supra*, the plaintiff commenced his action by a writ setting out an action on the case. The declaration contained but a single count and that in trespass. The declaration did not state the basis of the plaintiff's doubt whether his action should be trespass on the case or trespass; or that he had such doubt. This court sustained the action of the Superior Court in overruling a demurrer to that declaration; which demurrer was based on the ground of a variance between the writ and the declaration. The case at bar, in regard to this question of pleading, is identical with *Adams v. Lorraine Co.*, and is governed by it. As we have seen, the first two counts, being in covenant, are entirely outside of this consideration. The action is covenant; and the third count is drawn in the form of a count in assumpsit, without stating the nature of the plaintiff's doubt whether his action in regard to the matters set out in that count, should be covenant or assumpsit; or whether he has such doubt; and he has not joined any other count in covenant based upon the same matter. If *Adams v. Lorraine Mfg. Co.*, is not to be overruled this third count must be sustained. There is no provision in the statute that the doubt in the plaintiff's mind, which induces him to avail himself of the statute in question, shall be a doubt which appears to the defendant to be a reasonable one. Neither the statute nor this court in its consideration of the above cited case under the statute, have required plaintiffs to set out in pleading the nature of their doubt. Unless he shall be compelled to disclose it in his declaration, we know of no proceeding by which a plaintiff can be required to submit the nature of his doubt to the court that the court may pass upon either its existence or its reasonableness. There are not many circumstances in which the intelligent pleader would be in doubt whether his action should be covenant or assumpsit, though such circumstances may be conceived, and the statute contemplates that they may exist. This plaintiff by his action must be

held to claim that such circumstances do in fact exist in his case; and, in the matter now under consideration, his conclusion is controlling.

In its application to practice, the court in *Adams v. Lorraine Co.*, said of this statute, that its clear intention "is to do away with the distinction between actions of trespass and trespass on the case, so far as the adequacy of the writ to support counts in either trespass or trespass on the case is concerned." This interpretation of the statute imposes no hardship on the defendant. It is in the line of the liberal changes in common law pleading which are being introduced in states still adhering generally to that form of pleading. Under the section the defendant may plead to each of the several counts according to the practice at common law and judgment will be entered only upon the counts under which the plaintiff may be entitled to recover.

All the plaintiff's exceptions to the rulings of the Superior Court are sustained, and the case is remitted to the Superior Court, with direction to overrule the demurrer to the declaration as a whole and the demurrers to the several counts thereof; and to take further proceedings.

VINCENT, J., dissents.

Richard W. Jennings, William A. Morgan, for plaintiff.

Waterman & Greenlaw, Charles E. Tilley, for defendant.

JOHN MURAD vs. NEW YORK, NEW HAVEN & HARTFORD
RAILROAD CO.

JUNE 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Appeal and Error. New Trial.*

That the decision of the trial court in granting a non-suit, was against the evidence; against the law and against the law and the evidence, does not constitute valid grounds for a motion for a new trial, under Gen. Laws, 1909, cap. 298, § 12, as they are all for "errors of law occurring at the trial."

(2) Appeal and Error. New Trial. Exceptions.

Plaintiff filed a motion for new trial in the superior court alleging three invalid grounds and further on the ground of newly discovered evidence, but from the date of his motion until its denial, no affidavits of newly discovered evidence were filed.

Held, that as the motion for new trial when filed was upon the ground of newly discovered evidence, it was valid, and the fact that plaintiff did not support it upon that ground did not render it invalid, *ab initio*, and a notice of intention to prosecute a bill of exceptions filed within seven days after the denial of the motion for new trial was filed at the proper time.

TRESPASS ON THE CASE for negligence. Heard on motion of defendant to dismiss plaintiff's bill of exceptions and denied.

JOHNSON, J. This is an action of trespass on the case for negligence, brought by John Murad against the New York, New Haven and Hartford Railroad Company to recover damages for personal injuries. The case was tried in the Superior Court before Mr. Justice Brown and a jury in June, 1911, and on the 28th of that month, upon the defendant's motion, the plaintiff was nonsuited. On July 5, 1911, the plaintiff filed a motion for new trial on the following grounds:

"*First*. That the decision, ruling and action of Mr. Justice Brown in granting a motion for a nonsuit was against the evidence.

"*Second*. That the decision, ruling and action of Mr. Justice Brown in granting said motion for a nonsuit was against the law.

"*Third*. That the decision, ruling and action of Mr. Justice Brown in granting said motion for a nonsuit was contrary to the law and the evidence and the weight of the evidence.

"*Fourth*. That said plaintiff has discovered new and material evidence since the trial of said case and since the decision, ruling and action of Mr. Justice Brown in granting said motion for a nonsuit, said new and material evidence not being known to said plaintiff before and at time of the trial

of said cause, and which could not have been discovered by the plaintiff prior to or during the trial of said cause, even by due diligence. Said new and material evidence is of such character as to entitle said plaintiff to a new trial of said case."

On December 5, 1911, this motion was denied by Mr. Justice Brown. From the date of the filing of this motion up to the date of its denial no affidavits of newly discovered evidence were filed by the plaintiff in support of the fourth ground.

Upon December 12, 1911, the plaintiff filed his notice of intention to prosecute a bill of exceptions, and the time for filing bill of exceptions and transcript of evidence was fixed as January 20, 1912.

On January 20, 1912, the plaintiff filed the transcript of evidence and the following bill of exceptions:

"And now comes the plaintiff in the above entitled case and represents that said case was tried before Mr. Justice Brown and a jury on June 26, 27 and 28, 1911; that upon the conclusion of said plaintiff's testimony and upon said defendant's motion Mr. Justice Brown adjudged that the plaintiff be nonsuited; that within seven days of said decision, ruling and action of Mr. Justice Brown said plaintiff duly filed his motion for a new trial in accordance with the statute in that behalf made and provided; and that within the time fixed by Mr. Justice Brown for the filing of exceptions, transcript of evidence, etc., conformably to the statute in that behalf made and provided, said plaintiff now comes and prefers this his bill of exceptions, and for grounds of exceptions alleges:

"*First.* That Mr. Justice Brown erred in granting said defendant's motion for a nonsuit, to which said plaintiff duly excepted.

"*Second.* That Mr. Justice Brown's decision, ruling and action granting said defendant's motion for a nonsuit was contrary to the law, to which the plaintiff duly excepted.

"*Third.* That Mr. Justice Brown's decision, ruling and action granting said motion for a nonsuit was against the evidence and the weight thereof, to which the plaintiff duly excepted.

"And the plaintiff alleges that for all of said reasons his exceptions should be sustained and that a new trial should be granted to him."

This bill of exceptions was allowed by Mr. Justice Brown, on January 27, 1912. And on February 29, 1912, the defendant filed in this court a motion to dismiss said bill of exceptions. Upon that motion the case is now before the court.

The first three grounds of the motion for a new trial are clearly not valid grounds for a motion for a new trial under Sec. 12, cap. 298, Gen. Laws, 1909, as they are for "errors of law occurring at the trial."

The defendant contends that no affidavits having been filed the plaintiff's motion for a new trial on the fourth ground, that of newly discovered evidence, was never perfected; that the filing of such affidavits was absolutely necessary to make said motion valid or effective.

Section 17, cap. 298, Gen. Laws, 1909, prescribes as the initial step in the prosecution of a bill of exceptions to this court that the party desiring to prosecute such bill shall "within seven days after verdict or notice of decision, but if a motion for a new trial has been made then within seven days after notice of decision thereon . . . file in the office of the clerk of the Superior Court notice of his intention to prosecute a bill of exceptions to the supreme court." In *Sullivan v. White*, 34 R. I. 61, speaking of this section, the court says: "The intent of this provision is, that if a motion for a new trial be filed in a case by either party thereto, then either party wishing to prosecute a bill of exceptions shall file said notice of intention after decision upon the motion for new trial, and within seven days thereafter;" and again, "from a consideration of all the provisions of Chapter 298, Gen. Laws, 1909, for prosecuting bills of exceptions to this court, we are of the opinion that the pro-

cedure, intended by the statute, is that appellate proceedings from the Superior Court to this court shall not be taken by piecemeal; that bills of exceptions shall not be in order for filing in the Superior Court and for certification to this court until after all matters arising in the cause in the Superior Court have been determined; in case a motion for new trial is made by either party, not until after the decision on that motion has been given by the Superior Court."

As the motion for a new trial when filed was upon the ground of newly discovered evidence said motion was valid. The fact that the plaintiff did not afterwards support the motion upon that ground by affidavits does not render the motion invalid *ab initio*.

The plaintiff's notice of his intention to prosecute his bill of exceptions was filed within seven days after the denial of his motion for a new trial. Therefore under said Section 17, cap. 298, Gen. Laws, 1909, his notice of intention to prosecute his bill of exceptions was filed at the proper time.

The defendant's motion to dismiss the plaintiff's bill of exceptions is denied.

James A. Williams, for plaintiff.

Joseph C. Sweeney, Philip T. Gleason, for defendant.

ANGELA D. WOODWARD, *et al.*, appellants vs. THOMAS B. CONGDON, Ex'r, *et al.*, appellees.

JUNE 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Wills. Lapsed Legacies. Residue.*

Where X and Y were legatees and also residuary legatees and devisees, and X deceased in life time of testatrix, intestate, and without issue, the legacies which thereby lapsed, passed into the residue and the entire residue thus augmented passed to Y.

(2) *Wills. Lapsed Devises and Legacies.*

Under the rule of the common law as adopted in this state, lapsed legacies fall into the residue, and Gen. Laws, 1896, cap. 203, § 7 (now Gen. Laws, 1909, cap. 254, § 7), provides that unless a contrary intention appears in the will,

lapsed devises shall fall into the residue, and if a residuary devisee or legatee die before testator without leaving issue living at testator's decease, the remaining residuary devisees or legatees shall take his share, as therein provided.

Held, that the intent of the statute was to prevent intestacy in the case of a lapsed residuary devise or bequest and to provide for survivorship where any residuary devisee or legatee remains at death of testator.

Held, further, that where an estate was left in such manner that a lapse might occur, without any ultimate disposition of such legacies or devises as might lapse, other than that contained in a general residuary clause, the testator must be deemed to have executed the will with regard to the provisions of the statute.

(3) *Wills. Construction.*

A will should be construed so as to avoid partial intestacy if such construction is natural and reasonable.

(4) *Wills. Lapsed Legacies. Residue. Presumption.*

Where one of two residuary devisees and legatees deceased within a week after the execution of the will, since the will is to be deemed to have been executed in view of Gen. Laws, 1896, cap. 203, § 7 (now Gen. Laws, 1909, cap. 254, § 7), of lapsed devises and legacies), it is to be presumed that if testatrix had not intended the remaining residuary devisee and legatee to take under such statute, she would have made other provision for the disposal of that portion of the estate.

PROBATE APPEAL. Heard on agreed statement of facts.

PARKHURST, J. This case was certified to this court by the Superior Court of Newport County on an agreed statement of facts. It is an appeal to the Superior Court of Newport County from a decree of the Probate Court of Newport, entered June, 1911, allowing the account of the appellee, Thomas B. Congdon, as administrator c. t. a. of the estate of Emily E. Hurd, deceased, which account shows the payment of the entire residuary estate to T. Amory DeBlois, one of the appellees.

The facts, so far as they are material to the issues, are these: The will of Emily E. Hurd, which was executed December 6, 1900, provided, among other things as follows:

"4. To my said cousins, N. James DeBlois and T. Amory DeBlois, I give and bequeath the sum of \$2,500 each.

"15. Subject to the possession, use and enjoyment of all the articles hereinafter named by said E. Linzee Cunning-

ham during his natural life, and after his death only, I give and bequeath the same as follows, namely:—

“All the silver plate of every description inherited by me from my dear mother (it has the initial ‘D’ engraved upon it) to said Emily J. DeBlois. All the furniture in said house inherited from my said mother, consisting of the furniture in my drawer and in the guest chamber and all the bric-a-brac therein contained to said Emily J. DeBlois.

“All rugs, carpets, linen, blankets and bedding, all china, glass, bric-a-brac and ornamental furniture, not otherwise herein specifically bequeathed and all wines and cigars to said N. James DeBlois and T. Amory DeBlois.

“16. All the rest, residue and remainder of my estate of whatsoever kind and wheresoever situate of which I may die seized and possessed or to which I may then be entitled, I give, devise and bequeath to my cousins, said N. James DeBlois and T. Amory DeBlois.”

In addition to the above, the agreed statement establishes the following facts:

1. The death of testatrix, June 3, 1909, and the probate of her will.

2. The death of N. James DeBlois, intestate and without issue, December 13, 1900, devisee and residuary legatee and devisee, with T. Amory DeBlois (they together, under the terms of the will being entitled to the residuum).

3. The death of E. Linzee Cunningham, January 29, 1905.

4. The death of Emily J. DeBlois, February 2, 1907.

5. The next of kin of testatrix, including among others, these appellants.

The question arising upon the facts are these:

- (1) Upon the death of N. James DeBlois, without issue, prior to the death of testatrix: 1. Did the legacies to him, which lapsed, pass into the residue, or go to the next of kin of the testatrix? 2. Did the entire residue, together with the lapsed legacies as part thereof, pass to the surviving residuary legatee, T. Amory DeBlois, or did only one-half of

the residue pass to him, and the other half with the lapsed legacies pass to the next of kin of the testatrix?

The probate court decided, in accordance with the appellees' contention that the legacies which lapsed as to N. James DeBlois, passed into the residue, and that the entire residue thus augmented passed to the surviving residuary legatee.

The appellants contend, however, (1) that a specific bequest to a legatee who predeceases the testator does not fall into the residue, if the specific legatee is also one of the residuary legatees, but descends to testatrix's next of kin as intestate property: (2) that it appears from the will of Emily E. Hurd that she did not intend the lapsed portion of the residue given to N. James DeBlois to enlarge the portion thereof given to the surviving residuary legatee.

- (2) All the parties admit that it is unquestionably the rule at common law, as applied in this country, that lapsed or void bequests fall into the residue. And this has been recognized as the rule in Rhode Island, in the case of *Peckham v. Newton*, 15 R. I. 321, 324, and also in *Re Will of Isaac Reynolds*, 20 R. I. 429, 431, and *Nickerson v. Bragg*, 21 R. I. 296, 298. But the appellants contend further, that there is an exception to that rule which is well recognized and which controls the case now before the court, namely, that when the bequest is to a legatee who is also one of the residuary legatees, the bequest lapses, and goes to the testator's next of kin, and not to the surviving residuary legatee; that it is not logical to say that a gift to one lapsing shall go as a part of the residue to him not living, or in other words, to allow a residuary legatee to take when dead a legacy lapsed by reason of his own death; that the surviving residuary legatee does not take the deceased residuary legatee's share of the residue directly by the terms of the will, but, if he takes such share of the residue at all, it is by virtue of his survivorship as provided by our statute and that the statute gives the surviving legatee only "the share of such residuary . . . legatee so dying;" and that the "share of such residuary . . . legatee so dying" does not include a

specific bequest to him which lapses by his own death and which could not come to him dead and therefore could not become a part of his "share."

And the appellants, in support of this contention, cite certain cases, to wit, the case of *Craighead v. Given*, 10 S. & R. 351.

In that case there was a gift to seven legatees and the residue was to the same seven. One of the legatees died before the testator. The court said, at page 354: "To bequeath to Eliza Semple a portion of a residue happening in consequence of her own death is a construction which can never be supported" and held that the bequest to Eliza Semple who predeceased the testator went to the testator's next of kin and not to the other six residuary legatees.

In *Dorsey v. Dodson*, 203 Ill. 32, at page 37, the court said: "Where legacies are given to several legatees and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them" and quoted with approval the language used in *Craighead v. Given*, *supra*.

In accord with these two cases is *Crawford v. Cemetery Association*, 218 Ill. 399, 75 N. E. 998.

In *Silcox v. Nelson*, 24 Ga. 84, the court says: "When the residuum is given in distinct parcels as in this case, or to several as tenants in common, it is to be inferred that the testator did not intend that lapsed legacies should fall into the residuum, but it is to be presumed in such cases that he had expressed all that each residuary legatee should take." But an examination of these cases shows that no such statute as has existed in Rhode Island, since 1896 (nor any statute on the subject), was in contemplation of the courts which rendered these decisions.

The statute of this state relating to the matters here in question is found in Gen. Laws, 1896, Ch. 203, § 7, now Gen. Laws, 1909, Ch. 254, § 7, p. 882, and was in force at the time of the execution of the will (December 6th, 1900).

The statute provides as follows:

“Sec. 7. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator without leaving issue of such devisee living at the time of the testator’s decease, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will; and if a residuary devisee or legatee die before the testator without leaving issue living at the time of the testator’s decease, and there be other residuary devisees or legatees named in such will in the same residuary clause, such other residuary devisees or legatees named in said clause, whether a class or not, shall take at the testator’s decease the share of such residuary devisee or legatee so dying in like proportions as their shares bear one to another as expressed in said will under said residuary clause.”

It will be noted that the first clause of the above quoted section refers in terms only to lapsed “devises” of real estate, and makes no reference to lapsed legacies of personal property. But as the obvious intent of this statute was to prevent intestacy, where it was manifest that the testator did not intend to die intestate as to any portion of his estate, it was not necessary that the statute should refer to lapsed legacies, because under the rule of the common law as adopted in this state, as above shown, it was already the law that lapsed or void legacies of personal property should fall into the residue; and so it was only necessary to provide for the similar disposition of lapsed devises of real estate so as to prevent intestacy as to them.

It is manifest therefore that when N. James DeBlois died intestate, and without issue, December 13, 1900, both the specific pecuniary legacy to him, under the 4th clause, and the other specific legacy of certain tangible personal property bequeathed to him, under the 15th clause of the will above quoted, fell into the residue, for the benefit of such person,

if any, as should be ultimately entitled thereto; and that, as T. Amory DeBlois survived the testatrix, he became entitled to the residue thus augmented. The *ratio decidendi* of the cases above cited on behalf of the appellants which hold to a contrary rule is, that "where a testator gives specific legacies to several legatees and gives the residue to them as tenants in common, if each one receives his share of the residue over and above the specific legacies he receives exactly what the testator intended to give him. Having given to each specific sums and a specific share of the excess over the total of such sums, the proportion of those who live is not to be enlarged by a lapsed legacy. It is not to be inferred that the testator intended that a lapsed legacy to one should fall into the residue, so that the survivors should receive a different and increased portion of the testator's estate." In other words, this rule was intended to so interpret the will as to carry out the testator's intention, in accord with the general rule of interpretation of wills. See *Dorsey v. Dodson*, 203 Ill. 32, 37, 38; *Crawford v. Cemetery Ass'n*, 218 Ill. 399, 409; *Silcox v. Nelson*, 24 Ga. 84; *Lombard v. Boyden*, 5 Allen, 249, 251.

A similar rule has, prior to the adoption of the statute, been applied in this state with regard to shares under a residuary clause devising and bequeathing both real and personal estate to several children of the testator by name, as tenants in common, in equal shares, holding that where one of the residuary devisees died without issue in the lifetime of the testator, the part of the real estate devised to such deceased child lapsed, and being a part of the residue could not fall into the residue, so as to enhance the shares of the other residuary devisees, but would go as intestate estate to the heirs at law. *Church v. Church*, 15 R. I. 138; see, also, *Sohier, Adm'r, v. Inches*, 12 Gray, 385, 387; *Lombard v. Boyden*, 5 Allen, 249, 251.

The whole theory of these cases is based upon the legal effect of the tenancy in common, which negatives the idea of any right of survivorship as between the tenants.

As we construe the statute above quoted, it was intended to prevent, in the second part thereof, the further application of this rule, so as to prevent intestacy in the case of a lapsed residuary devise or bequest, and to effectually provide for survivorship where any residuary devisee or legatee remains at the testator's death to take the estate. We are well satisfied that the said statute is effectual to do away with both the aforementioned rules regarding lapsed devises and legacies, and when the testator, as in this case, leaves estate in such a manner, that a lapse may occur, without any ultimate disposition of such legacies or devises as may become lapsed other than that contained in a general residuary clause, the testator must be deemed to have executed the will with regard to the provisions of the statute above quoted, and to have intended that such provisions should operate in case a specific devise or bequest became inoperative for any reason. *Missionary Society v. Pell*, 14 R. I. 456. And this (3) construction of the will is in accord with the general rule to so construe a will as to avoid partial intestacy, if such construction is natural and reasonable. *Staples v. D'Wolf*, 8 R. I. 74; *Pell v. Mercer*, 14 R. I. 412, 427; *Smith v. Greene*, 19 R. I. 558, 560; *Fiske v. Fiske*, 26 R. I. 509, 512.

The second contention of the appellants is that it appears by the will that the testatrix did not intend the lapsed portions of the residue given to N. James DeBlois to enlarge the portion given to the surviving residuary legatee. We find no expressions in the will to indicate that the testatrix had in mind a possible lapse of the portion of the residuary bequest to N. James DeBlois. It is to be noted that while he is mentioned as a devisee and legatee in the 3d, 4th, 15th and 16th clauses of the will, in conjunction with his brother, he died December 13, 1900, one week after the will was executed, December 6, 1900; and that the testatrix lived until June 3, 1909. As the testatrix is to be deemed to have executed her will in view of the statute above quoted which provides for survivorship as between the residuary legatees, it is to be presumed that, if she had not intended T. Amory DeBlois to

take under the statute, his brother's portion of the residuary bequest, such brother having died so shortly after the date of the will, she would have made other provision for the disposal of that portion of the estate. It is quite evident that T. Amory DeBlois was a special object of her bounty equally with his deceased brother, and that it was in accord with her intention that he should take the portion which his brother would have taken had he survived. We cannot suppose that she had in mind any such rules of law with regard to lapsed legacies as are contended for by the appellants which, as we have shown, were done away with by the provisions of our statute, or that she intended for any such reasons to leave any portion of her estate to be distributed as intestate property.

For these reasons our decision is that the decree of the Probate Court of the city of Newport, appealed from, whereby the account of Thomas B. Congdon, administrator with the will annexed of the estate of Emily E. Hurd, was allowed and recorded, was in accordance with law, and should be affirmed.

The papers in the case will be sent back to the Superior Court for the county of Newport, with our decision endorsed thereon, in accordance with this opinion.

Burdick & MacLeod, for appellants.

Loundes Calhoun of the Georgia bar, of counsel.

Sheffield, Levy & Harvey, for appellees.

GEORGE W. SAUTHOF vs. AMERICAN CENTRAL INSURANCE
COMPANY.

JUNE 11, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Fire Insurance. Appraisal.*

Under the provisions of an insurance policy, "1. The company shall not be liable beyond the actual cash value of the property at the time any loss or

damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value—said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers—it shall be optional with this company to take all or any part of the articles at such ascertained or appraised value—.

“2. If fire occur the insured—shall make a complete inventory, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire—shall render a statement to this company stating the cash value of each item thereof and the amount of loss thereon” the report of appraisers fixed the sound value of the damaged property and the loss thereon in the aggregate and did not show the sound value of and loss upon each particular article.

Held, that an itemized appraisal was necessary to the exercise of certain rights expressly given the defendant, and therefore the report of the appraisers as rendered was not a sufficient compliance with the statute and was void.

(2) *Construction of Statutes.*

In the construction of statutes, the intent of the whole act shall control, and all the parts be interpreted as subsidiary and harmonious, so that no clause, sentence or word shall be void, superfluous or insignificant. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject matter and general purpose of the statute. If upon examination, the general meaning and object of the statute should be found inconsistent with the literal import of any particular clause or section, such clause or section must if possible be construed according to that purpose.

ACTION under policy of fire insurance. Heard on exceptions of plaintiff, and overruled.

VINCENT, J. This is an action brought under a policy of insurance issued by the defendant company to the plaintiff, whereby the defendant contracted to insure the plaintiff against all direct loss or damage by fire, upon certain personal property in said policy mentioned. The property enumerated in said policy having been damaged by fire, the plaintiff, within sixty days thereafter delivered to the defendant company his duly authenticated proof of claim, embodying an itemized list of the damaged articles to each of which several items were appended certain figures indicating both the sound value and the loss or damage.

This estimate of the plaintiff not proving satisfactory to the defendant company, the latter claimed an appraisal in accordance with its rights under the policy. Each of the

parties having appointed an appraiser and the two so chosen having selected an umpire, they proceeded to discharge their duties and later made a report of their doings to the plaintiff and to the defendant company.

This report fixed the sound value of the damaged property at \$1,000, and the loss thereon at \$756.29. This report, made by the appraisers, as aforesaid, gave the sound value and the loss in the aggregate and did not show the sound value of and loss upon each particular article.

At the trial of the case the plaintiff offered in evidence the report of the appraisers, above mentioned. The defendant objected to its admission on the ground that the award of appraisers, appointed in accordance with the provisions of the policy, should contain an itemized list of the property and that the appraisers should state separately the sound value of and the loss upon each item. The objection of the defendant was sustained by the trial court and the plaintiff excepted. At the close of the plaintiff's testimony, no award having been introduced in evidence, a motion to non-suit the plaintiff was granted and to the granting of this motion the plaintiff also excepted. Other exceptions taken by the plaintiff during the course of the trial are not considered by the plaintiff in his brief and must be considered as waived. Upon the two exceptions above mentioned the case is now before this court.

- (1) The provisions of the policy necessary to the consideration of the question presented are as follows: "1. The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value," . . . "said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable after due notice, ascertainment, estimate and satisfactory proof of the loss have been received

by this company in accordance with the terms of this policy. It shall be optional, however, with this company *to take all or any part of the articles* at such ascertained or *appraised value*, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality." . . .

"2. If fire occur the insured shall give immediate notice of any loss thereby in writing to this company," . . . "separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the *quantity and cost of each article* and the *amount claimed thereon*; and within sixty days after the fire" . . . "shall render a statement to this company signed and sworn to by the insured, stating . . . the *cash value of each item* thereof and the *amount of loss thereon*."

The plaintiff contends that it is not necessary that the report of the appraisers should contain an itemized list of the several articles damaged, together with the sound value of and the loss upon each article, but that the aggregate loss as given by the appraisers, in the present case, is a sufficient compliance with the terms of the contract.

The plaintiff in support of his position cites the case of the *Continental Ins. Co. v. Garrett*, 60 C. C. A. 395, but we do not think that this case deals with the particular question raised in the case at bar. In that suit the subject of insurance was a dwelling house and constituted but a single item upon which it was competent for the appraisers to fix the sound value and the amount of the loss. The appraisers, however, omitted to ascertain the sound value and only found the amount of the loss. Upon that point the court said: "The submission required the appraisers to determine two things, and two things only, for the submission was only for the purpose of determining the amount of loss, and no other defence open to the insurer was submitted. The policy itself required that the appraisers should state separately sound value and damage." . . . "Sound value is the cash value, making an allowance for depreciation due to use, etc., at and immediately preceding the time of the fire.

This definition is plainly implied by the paragraph from the submission set out above. The award is therefore not in accordance with the submission, because the sound value has not been estimated or appraised."

This, however, being a suit in equity, the court having obtained jurisdiction for the purpose of setting aside the award, which had been pleaded in bar to the pending suit at law upon the policy, retained the case and determined the loss and damage.

The plaintiff has also cited authority to the effect that courts approach the interpretation of a statute with the presumption that words and phrases therein are used in their familiar and usual sense, without any forced, subtle, or technical consideration to limit or extend their meaning (26 A. & E. Enc. of Law, p. 605, § 5); that all legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the person with whom he shall do business, should receive strict construction; that it is a well established rule of construction that statutes in derogation of the common law are to be strictly construed and hence while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law, further or otherwise than the clear import of the statutory language necessarily required (26 A. & E. Enc. of Law, p. 662); that strict construction as applied to statutes means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words and to bring them within the prohibition or penalty of such statutes, that it does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so constructed which does not clearly come within the meaning of the language used (26 A. & E. Enc. of Law, § 7, p. 657).

(2) While we do not disapprove of or question these propositions of law we do think that they are not applicable to the particular matter under consideration. The general rule of law is that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. They are to be brought into harmony, if possible, and so considered that no clause, sentence or word shall be void, superfluous or insignificant. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject matter and general purpose of the statute. If, upon examination, the general meaning and object of the statute should be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. Sutherland on Statutory Construction, §§ 240, 241.

We cannot agree with the contention of the plaintiff regarding the construction of the statute in question. It is expressly provided in the policy that the company shall, at its own option, have the right to take all or any part of the articles damaged at the appraised value. If this court should hold that the report of the appraisers was a substantial compliance with the terms of the contract, the effect would be to completely abrogate that other provision of the contract which gives to the defendant the right to take all or any part of the articles at the appraised value. An itemized appraisal is therefore absolutely necessary to the exercise of certain rights and privileges which are expressly given to the defendant under the contract.

For these reasons we think that the statute in question must be construed, if possible, so as to give effect to all parts thereof and that any other construction would be unwarrantable. We are, therefore, of the opinion that the report of the appraisers giving the sound value of and the loss upon the property in the aggregate was not a sufficient compliance with the statute and therefore void, and that the nonsuit was properly granted by the Superior Court.

The plaintiff's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment on the nonsuit.

JOHNSON, J., dissenting. The award made by the appraisers was as follows:

"AWARD.

"To the parties in interest:

"We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value and the loss and damage to be as follows:

	Sound value.	Loss.
" 1st item Household furniture &c.	\$1000	\$756.29
" Total. Sound Value and Loss.	1000	756.29

"Witness our hands this 21st day of September, 1909.

"EDWIN DRAPER,

"CHAS. A. COOLEY,

"Appraisers."

The exceptions are: "First. Exception to the ruling of the court denying the introduction of a certain written award of appraisers, as appears from pages 48-61 of said transcript, the said exception to the ruling of said court being noted on page 61.

"Second. Exception to the decision of the court granting the defendant's motion for a nonsuit, on the ground that the evidence was not sufficient to sustain the second count of plaintiff's declaration in said case, as appears on page 82 of said transcript, and which fully appears from said transcript of testimony, which said transcript of testimony contains all the testimony taken during the trial of said case."

The award should have been admitted in evidence.

In *Early v. Providence & Washington Ins. Co.*, 31 R. I. 225, 230, the court, speaking of the attempt of the plaintiff in that case to impeach the award by showing (1) that the

value of certain goods, and the plaintiff's loss thereon, were not considered in ascertaining the amount of the award because of an erroneous decision by the appraisers that certain goods were not covered by the policy, and (2) by showing that the umpire and the appraisers chosen by the defendant were not competent and disinterested, said: "The general rule is that this cannot be done in an action at law in jurisdictions where the distinction between law and equity is still maintained. *Georgia Home Ins. Co., v. Kline Co.*, 114 Ala. 366; *Kaplan v. Niagara Fire Ins. Co.*, 73 N. J. L. 780; *Robertson et al. v. Scottish Union & Nat. Ins. Co.*, 68 Fed. 173; *Levin v. Northwestern Nat. Ins. Co.*, 146 Fed. 76.

"Thus in *Georgia Home Ins. Co. v. Kline & Co.*, *supra*, the plaintiff brought an action under a fire insurance policy containing the same arbitration agreement, with a few minor verbal changes, found in the Rhode Island standard form. The defendant pleaded an award, to which the plaintiff replied that the arbitrators wrongfully refused to consider a large amount of goods covered by the policy. And it was held, in sustaining the defendant's demurrer to the reply, that the award could not be contradicted in a court of law, because (p. 372) 'the submission, on its face, submitted and carried before the arbitrators, the matter of the entire loss, and the award shows they passed upon, and adjudicated the entire loss.'

"In *Kaplan v. Niagara Fire Ins. Co.*, *supra*, where it appeared, in an action on a fire policy containing an arbitration agreement identical in all ways with the clauses in the Rhode Island form, that an award had been made, it was held that evidence introduced for the purpose of showing that the appraisers omitted to take into account certain articles alleged to have been covered by the policy and destroyed, was properly excluded, because (p. 789): 'Their award cannot be impeached *at law* for erroneous judgment upon facts, nor can it be for the omission of items of account which are within the terms of the submission.'

"*Robertson et al. v. Scottish Union & Nat. Ins. Co., supra*, was an action on a fire policy containing the arbitration clauses quoted above, in which an award had been made. And it was held that the plaintiff could not prove that the loss sustained was greater than the amount found by the appraisers, nor that the appraiser selected by the insurer, and the umpire, were not competent and not disinterested, because, where the distinction between law and equity still prevails, an award can not be attacked in an action at law for misconduct of the appraisers, and that, therefore (p. 175): 'in this forum (law side of the court) the award is binding on the parties, and no recovery can be had in this action beyond the amount therein ascertained.'

"So also in *Levin v. Northwestern Nat. Ins. Co., supra*, it was held that the defendant's motion to strike out the plaintiff's reply, setting up fraud on the part of the appraisers appointed under an arbitration clause identical with the Rhode Island form should be granted, because, where the distinction between law and equity is still preserved, the award cannot be impeached in a court of law for misconduct of the arbitrators.

"These cases seem conclusive of the case at bar. In this case, as in them, the plaintiff avers that an award has been made which on its face determines the entire liability of the defendant under the policy; and in this case, as in them, the plaintiff seeks to recover, in an action at law, a sum greater than that awarded, and to impeach the award because of alleged misconduct on the part of the appraisers in excluding certain items while estimating the loss, and because of incompetency. This, as the above authorities show, he can not do in this form of action."

That case is decisive of the case now before us. The award cannot be impeached in a court of law any more successfully by the defendant than by the plaintiff. The court certainly cannot accomplish the invalidation of the award any more effectively by declaring it invalid when offered in evidence, and excluding it, than by passing upon

it and declaring it invalid when in evidence. The plaintiff having complied with the provisions of the policy in regard to an appraisal and the appraisal having been made, the loss became payable by the terms of the policy "sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." If the defendant desired to impeach the award it could have brought its suit in equity to do so upon any grounds it wished to urge. Not having done this it cannot accomplish its purpose in a court of law, but must abide by the award.

The plaintiff's exceptions should be sustained.

Cook & Brownell, for plaintiff.

C. M. Van Slyck, Frederick A. Jones, for defendant.

BENJAMIN W. GRIM vs. WILLIAM M. LEE, City Treasurer.

JUNE 29, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Municipal Corporations. Town Councils. Town Officers. Defence of Police Officer.*

A town council has discretion to direct the town solicitor to defend a police officer of the town, in a suit for damages growing out of his acts as such officer, where they believe he was acting in good faith in the performance of his duty in the matter, and the attorney may recover against the town the reasonable value of his services

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action of assumpsit to recover the sum of three hundred ninety-three dollars for salary as judge of probate and services rendered as town solicitor for the town of Cranston.

The suit was commenced in the District Court of the Eighth Judicial District, and, on the entry day of the writ, a jury trial was claimed by the plaintiff. The case was tried before a justice of the Superior Court and a jury on October 30th and 31st, 1911, and, by direction of the court, the jury returned a verdict for the plaintiff for the sum of four hundred thirty-two dollars and fifty-five cents, the full amount of the plaintiff's claim with interest. The defendant now comes before this court with its bill of exceptions.

The defendant did not take an exception to the direction of a verdict by the court, the only exception being to the refusal of the court to charge the jury as follows:

"1. That the plaintiff cannot recover for that part of his claim from April 1st, 1909 to April 23rd, 1909, because there was no appropriation made by the town for the payment of the town solicitor.

"2. That the plaintiff cannot recover the sum of fifty dollars as charged for defending William H. Stone, a police officer of said Cranston, in a civil suit brought against him individually."

There was nothing for the court to do but refuse the first request, because no such claim was made by the plaintiff. A part of the plaintiff's claim was a balance of twenty-three dollars due for salary as Judge of Probate from April 1st, 1909 to April 19th, 1909. There is nothing in the record to show that the plaintiff ever made any claim for salary as town solicitor for said period between April 1st, 1909 and April 23rd, 1909. Therefore, the only question in this case that is before the court, for its consideration, is said request numbered "2."

The plaintiff testified without contradiction that he was directed by the town council when in session, and after he had explained the case to them, to defend William H. Stone, a police officer of the town, who had been sued in a civil suit for action taken by him in the discharge of his duty as a police officer; that a majority of the town council was present at the time when they directed him to defend the officer,

and it does not appear that any objection was made, nor does it appear that any formal vote was made or recorded in the matter. The plaintiff did so defend the officer, and charged \$50 for the service and testified that the charge was a reasonable one for the service rendered, and this was not disputed by the defence. There was no testimony to the contrary. Later on the plaintiff presented his bill with this item to the council for allowance, and the same was duly allowed, and ordered paid; but it has not been paid, for reasons which do not appear in evidence.

We find no error in the refusal of the court below to charge as requested. We think it was in the discretion of the town council to direct its town solicitor to defend its police officer in a suit for damages growing out of his acts as such officer, if they believed he was acting in good faith in the performance of his duty in the matter complained of in the suit against him. The general principle involved was carefully considered in the case of *Sherman v. Carr*, 8 R. I. 431. The court, after discussing the law applicable to cases of this nature, said: "It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city, that, on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution. Under such a state of the law, every executive officer of the corporation would feel that he was acting as the servant and agent of that corporation, relying upon their good faith and good judgment toward him, so long as he acted in good faith and good judgment in the discharge of his duties.

"This distribution of power, which would be practically the wisest in the administration of municipal affairs, is the one which we understand to be in accordance with the existing law and long continued practice in this State." . . .

"We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him."

As to the general power of towns to indemnify their officers against claims for damages, see *Cooley*, Cons. Lim. 7th Ed. pp. 306, 308; 1 *Abbott*, Mun. Corp. p. 694; *Hadsell v. Hancock*, 3 Gray, 526; *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 Pick. 566; *Fuller v. Groton*, 11 Gray, 340; *Baker v. Windham*, 13 Me. 74; *Briggs v. Whipple*, 6 Vt. 95.

In the case of *Pike v. Middleton*, 12 N. H. 278, it was held that selectmen, who under the law "shall have the ordering and managing of all the prudential affairs of the town," have the power to make a valid agreement to indemnify the tax collector from the costs and expenses of defending actions brought against him, for acts done in the performance of his duties.

Some question was attempted to be raised in this case, as to whether appropriations had been lawfully made, under which money could be lawfully applied to pay the claims made by the plaintiff. It clearly appears from the record that such appropriations were made, which fully cover all of the items in suit.

The defendant's counsel also claims in his brief that the same questions involved in the suit of *Patrick Trainor v. William M. Lee*, *City Treasurer* (34 R. I. 345), are raised in this case, viz.: regarding the contention that the town of Cranston had exceeded its debt-limit, and so could not lawfully contract for the plaintiff's services. In this the defendant's counsel is in error. No such question was raised in this case, either by special plea or by the offer of evidence, and if it had been it is fully disposed of in *Trainor v. Lee*, *supra*.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment for the plaintiff upon the verdict directed by the court.

Clarence A. Aldrich, *Benjamin W. Grim*, for plaintiff.
John P. Brennan, for defendant.

TIMOTHY CARROLL vs. ALFRED A. SANFORD, *et al.*

JUNE 29, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Attachment. Curtesy Initiate. Married Women.*

An estate of tenancy by the curtesy initiate is not attachable for the debts of the husband.

TRESPASS AND EJECTMENT. Certified on agreed statement of facts.

JOHNSON, J. This case has been certified to this court by the District Court of the Second Judicial District under Gen. Laws, 1909, cap. 298, § 4, upon the following

“AGREED STATEMENT OF FACTS.

“This is an action of trespass and ejectment brought by Timothy Carroll against Alfred A. Sanford and Nicholas Baker to recover possession of the following premises situate in the village of Wakefield, in the town of South Kingstown, and bounded and described as follows:

“Northerly on Mechanic street, a highway, so-called, one hundred and ten (110) feet; easterly on land now or formerly of the estate of John Caswell, deceased, one hundred and eight (108) feet more or less to land of the Narragansett Pier Railroad Company, southerly on land of said railroad company one hundred and ten (110) feet and westerly on land now or formerly of the estate of John R. Clark, deceased, one hundred and eight (108) feet more or less, in the line of the aforesaid street or highway,” which said premises the said plaintiff Carroll alleges he is entitled to possession of for the life of Alfred A. Sanford. He further alleges that said defendants are tenants at sufferance of the aforesaid premises.

"In this case it is agreed by and between the parties thereto that the facts are as follows:

"(1) The plaintiff, Timothy Carroll, prior to the beginning of this action, to wit, on the nineteenth day of May, A. D. 1910, began suit against one of the defendants, to wit, Alfred A. Sanford, and attached on his original writ therein all the estate, right, title, interest and property of the said Alfred A. Sanford in the premises described in this declaration; on the twenty-first day of November, A. D. 1910, the said plaintiff, Carroll, obtained judgment against the said Alfred A. Sanford for \$4,122.00 and costs; on the sixth day of February, A. D. 1911, the said plaintiff, Carroll, levied on all the estate, right, title, interest and property which said Alfred A. Sanford had at the time of the attachment on the original writ in the premises described in this declaration, by virtue of an execution issued in the case of *Timothy Carroll vs. Alfred A. Sanford*, Washington, No. 202, which said execution was returnable May 28, 1911; and on the fifteenth day of May, A. D. 1911, the said plaintiff, Carroll, caused to be sold on execution sale on said judgment all the estate, right, title, interest and property of the said Sanford in the premises described in this declaration, and at said sheriff's sale the said plaintiff, Carroll, became the purchaser thereof and took a sheriff's deed therefor, which said deed was recorded on June 13, 1911, in the Records of Land Evidence for the Town of South Kingstown, in Book 38, at page 18.

"(2) At the time of the attachment of the premises described in this declaration on the original writ in the case of *Timothy Carroll vs. Alfred A. Sanford*, Washington, No. 202, said Alfred A. Sanford was not the owner in fee of said premises. They were purchased entirely with the money of Ethel B. Sanford, wife of said Alfred A. Sanford, in 1908, and stood of record in truth and in fact as her property: There were, however, issue born alive of the marriage between Alfred A. Sanford and Ethel B. Sanford, capable of inheriting the property in event of the death of said Ethel B. Sanford,

which said children are now living. At the time of the aforesaid attachment Ethel B. Sanford was alive. She died on the eighth day of September, 1910, intestate. Subsequent to the aforesaid attachment and to the said demise of the said Ethel B. Sanford, but before the levy on the premises described in this declaration by the said plaintiff, Carroll, under his execution and before the execution sale aforesaid, to wit, on the twentieth day of September, A. D. 1910, the said Alfred A. Sanford conveyed by deed all his right, title and interest in the premises described in this declaration to the other of these defendants Nicholas Baker, which deed was recorded the twentieth day of September, A. D. 1910, in the Records of Land Evidence of the town of South Kingstown, in Book 37, at page 521.

“(3) At the time this action of trespass and ejectment was begun and for some time prior to that time, said Alfred A. Sanford was in possession of said premises, living in the house on the tract in question, together with his said children.

“Due and legal notice to quit the said premises on or before July 1, 1911, was served on the said defendants, by the said plaintiff, Timothy Carroll.

“Upon the aforesaid agreed statement of facts the parties pray the judgment of the court.”

The question of law involved is: Did Timothy Carroll, by his attachment and subsequent purchase at execution sale of the interest of Alfred A. Sanford in the property of his wife in question, said interest at the time of said attachment being that of curtesy initiate, but before said sale becoming curtesy consummate, secure such title as will support this present action against the said Alfred A. Sanford and his grantee, said grant, however, having been made subsequent to the attachment and the death of his wife, but prior to the execution sale?

Section 1, cap. 246, Gen. Laws, 1909, provides that “The real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be

acquired by her own industry, including damages recovered in suits or proceedings for her benefit and compensation for her property taken for public use and the proceeds of all such property shall be and remain her sole and separate property free from control of her husband." Under said cap. 246, Gen. Laws, 1909, is an estate by curtesy initiate attachable? Section 1 provides that the property enumerated "shall be and remain her sole and separate property free from control of her husband." Section 8 provides: "The right of the husband in the real estate of the wife as tenant by the curtesy . . . shall not be impaired by the provisions of this chapter." Section 12 provides that "The wife or her property shall not be liable for the contracts or the torts of her husband."

The first married women's act in this State appears in Pub. Laws, 1844, at page 270, entitled: "An Act concerning the property of Married Women." It is provided by the first section thereof as follows: "Section 1. The real estate, chattels real, household furniture, plate, jewels, stock or shares in the capital stock of any incorporated company of this state, or debts secured by mortgage on property within this state, which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be and are hereby so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken for the debts of the husband, either before or after his death; and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property."

The words "so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken for the debts of the husband either before or after his death; and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property," were continued in the revision of 1857, in Section 1 of Chapter 136

of the Revised Statutes. This statute was considered in *Greenwich National Bank v. Hall*, 11 R. I. 124. The court held that the husband's tenancy by the curtesy initiate is not subject to attachment for the husband's debts. At p. 127, the court, Durfee, C. J., says: "The statute expressly says that the real estate which is the property of any woman before marriage, or which may become her property after marriage, shall be so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death. The protection extends to the real estate which is the property of a woman before marriage, to the real estate which may become her property after marriage, and to all the rents, profits and income of her real estate of either description. Let us consider the question submitted to us first, with reference to the real estate which is her property before marriage. Certainly an exemption which covers the real estate which is the property of a woman before marriage, together with all the rents, profits, and income thereof, leaves nothing to be attached; for any interest which the husband acquires therein as the result of the marriage must necessarily be some portion of the real estate or of the rents, profits, or income thereof, all of which is exempt. Does the real estate which becomes her property after marriage stand upon any different footing? We think not. The two descriptions of property are coupled in the same sentence, and in a manner which shows that they were both intended to have the same immunity. That which is protected is not the real estate which the wife has at the time of the attachment, but the real estate which was her property before or which becomes her property after marriage. And this construction, based on the letter of the statute, is in keeping with its spirit. The design was to secure the estate during the life of the wife from molestation by the creditors of the husband, and this design is promoted by holding that during her life he simply as husband has no interest in her real estate

which can be attached in any suit to which she is not a party."

The next change in the statute appears in the revision of 1872, Gen. Stat., cap. 152, § 1, — "The real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use; neither the same, nor the rents, profits, or income of the same, nor any part thereof, shall be liable to be attached, or in any way taken, for the debts of the husband either before or after his death; and upon the death of the husband in the lifetime of the wife, shall be and remain her sole and separate property."

This section was considered *In re* the Voting Laws, 12 R. I. 586. The opinion stated that the law of 1844 did not in any way affect the right of the husband to vote under Article 2, Section 1, of the constitution, upon the property of his wife, so long as she left him in the enjoyment of it. Then at page 592: "The law of 1844 remained without material change until the General Statutes went into effect, December 2, 1872. The General Statutes introduced an important modification by enacting that the real property of a married woman 'shall be *absolutely* secured to her sole and separate use,' instead of 'so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband.' It is true the old provision, that the husband may receive the rents and profits until the persons who are held for them are notified in writing by the wife not to pay them to him, remains unaltered. But this does not authorize us to conclude that the modification is of no effect. It is easy to construe that provision as being simply in the nature of a license or permission from his wife, which may be presumed until it is expressly repudiated or revoked. But there can be no estate by marital right in property which is absolutely secured to the sole and

separate use of the wife. The estate is utterly incompatible with so exclusive an appropriation. See *Martin & Goff v. Pepall*, 6 R. I. 92, 94. Nothing remains for the husband which he can really call his own. We think, therefore, that no husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, can be entitled to vote under Article 2, Section 1, simply as tenant by marital right." The opinion held that the new statute did not retroact so as to destroy an estate by marital right previously acquired and thus disfranchise the tenant, and that therefore any person who had acquired a right to vote previous to December 2, 1872, as tenant by marital right, and, *a fortiori*, as tenant by the curtesy initiate, was not affected in his right by the new statute which then went into effect. The opinion then proceeds: "One other question remains to be considered, namely, can a husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, be entitled to vote under Article 2, Section 1, if he has had issue by her capable of inheriting it? The new statute, Gen. Stat. R. I., cap. 152, § 14, provides that the right of the husband in the real estate of the wife as tenant by curtesy shall not be impaired. But this cannot mean that this right as tenant by the curtesy *initiate* shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right as well as the mere marital title. It means, doubtless, that tenancy by the curtesy, in its stricter sense, as consummate by the death of the wife, shall not be impaired."

The opinion then considers the question whether the right to vote is lost.

The statute remained unchanged in the Public Statutes, 1882, but appeared in its present form in the General Laws, 1896.

Under the provisions of the present statute, cap. 246, Gen. Laws, 1909, § 1, it is provided that the property of the

wife enumerated "shall be and remain her sole and separate property free from the control of her husband." We think this secures the property to her separate use as effectively as the words of cap. 152, § 1, Gen. Statutes, 1872, viz.: "shall be absolutely secured to her sole and separate use." The express provision that the property "shall not be liable to be attached, or in any way taken, for the debts of the husband" is not in the present statute. Section 12 of said chapter, however, provides that: "The wife or her property shall not be liable for the contracts or the torts of her husband." The provision of Section 8 that "The right of the husband in the real estate of the wife as tenant by the curtesy . . . shall not be impaired by the provision of this chapter," does not enlarge the right of tenancy by the curtesy beyond what it was under the statute under consideration, *In re the Voting Laws, supra*, where at page 593, the opinion says: "The new statute, Gen. Stat. R. I., cap. 152, § 14, provides that the right of the husband in the real estate of the wife as tenant by curtesy shall not be impaired. But this cannot mean that this right as tenancy by the curtesy *initiate* shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right as well as the mere marital title. It means, doubtless, that tenancy by the

(1) curtesy, in its stricter sense as consummate by the death of the wife, shall not be impaired."

We are of the opinion that under cap. 246, Gen. Laws, 1909, an estate of tenancy by the curtesy *initiate* is not attachable. As the defendant, Alfred A. Sanford, at the time of the attachment merely had an estate by the curtesy *initiate*, the plaintiff took nothing by his purchase at the execution sale of the right title interest and property which said Alfred A. Sanford had at the time of the attachment in the premises described in the declaration, and therefore acquired no title to said premises which will support this action of trespass and ejectment.

Decision for the defendants for costs. The papers in the case will be sent back to the District Court of the Second

Judicial District, with the decision of this court certified thereon, for further proceedings.

Dexter B. Potter, Edward A. Stockwell, for plaintiff.

Frederick C. Olney, Harvey A. Baker, for defendant.

PATRICK TRAINOR vs. WILLIAM M. LEE, City Treasurer.

JUNE 29, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Municipal Corporations. Current Expenses. Municipal Officers.*

Services of a chief of police and town sergeant are within that class incidental to the ordinary daily affairs of a municipal corporation, and the compensation therefor falls within the current expenses of such corporation.

(2) *Municipal Corporations. Current Expenses. Municipal Officers.*

The services of a dog officer, under the statutes, are incidental to the management of the affairs of a town as a proper police regulation and the compensation therefor fixed by law is to be deemed one of the current expenses of the town.

(3) *Municipal Corporations. Statutory Fees. Debt Limit.*

Whether or not a town has exceeded its debt limit has no application as to fees fixed by statute as compensation for a duty imposed by law.

(4) *Municipal Corporations. Statutory Fees. Debt Limit. Evidence.*

In an action brought by plaintiff for services rendered by him as chief of police, town sergeant and dog officer, evidence offered to show that the debt limit of the town had been exceeded was immaterial, in the absence of proof showing that the town had not the means in its treasury to pay the claims or that it would not have the means from its current revenue.

(5) *Evidence. Record Evidence.*

In an action to recover for the services of a municipal officer oral evidence offered by defendant's counsel in person, that there was no appropriation made by any proper authority from which payment of plaintiff's claim could be made, was properly excluded, where the record evidence was neither produced nor the lack of such evidence accounted for.

ACTION ON THE CASE. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action of the case to recover the sum of four hundred and forty-three dollars and twenty-one cents (\$443.21), for services rendered by the plaintiff as Chief of Police, Town Sergeant, and Dog Officer of the town of Cranston and the city of Cranston.

The suit was commenced in the District Court of the Eighth Judicial District and, on the entry day of the writ, a jury trial was claimed by the plaintiff, and the case certified to the Superior Court. The case was tried before a justice of the Superior Court and a jury on the second day of November, A. D. 1911, and a verdict returned for the plaintiff for the full amount of his claim, with interest and costs, amounting to \$484.74, by direction of the court.

The defendant now comes before this court upon bill of exceptions, the exceptions being to the direction of the verdict for the plaintiff, and also to the exclusion by the court of testimony offered by the defendant to show that at the time when the services were rendered by the plaintiff the town of Cranston was indebted in excess of the statutory limit of four (4) per cent. of the taxable property of the town; and to the further exclusion of testimony of counsel for the defendant who offered himself as a witness for the defendant, that no appropriation of money was made from which the claims of the plaintiff could properly be paid.

The proof showed that the plaintiff was the duly elected and qualified Chief of Police, Town Sergeant and Dog Officer of the town and city of Cranston; Town Sergeant from April 1 to April 19, 1909; Chief of Police, April 18 to June 3, 1910, and Dog Officer in April, 1910; and that the services for which compensation was claimed were actually rendered by him between those dates, and that the claims had been duly presented to the town council of the town of Cranston in part, and to the city council of the city of Cranston as to the whole, and that no part thereof had been paid; and there was no dispute as to amounts claimed, as being correct.

The defendant pleaded the general issue, and two special pleas: (1) setting up that the town of Cranston was in-

debted in excess of its debt limit fixed by statute (Chap. 1428, Jan., 1895), at four per cent. of the taxable property of the town; (2) setting up that at the time when the claims of the plaintiff for services are alleged to have been incurred and to have accrued, there was no authority to incur the same by virtue of any vote, resolution, etc., or by virtue of any authority on the part of any officer or agent of the town.

The principal contention of the defendant was made under its first special plea, that inasmuch as the town of Cranston was, at the time when the services were rendered, indebted in excess of its four per cent. debt limit, it could not lawfully incur such obligations to the plaintiff as he claims, because that would be to incur a debt in excess of the statutory limit. To that plea the plaintiff duly filed its demurrer, on the following grounds:

“First. That it does not appear in and by said plea that there was no money in the treasury of the Town of Cranston at the time said indebtedness was incurred which had been specially set apart for the payment of claims like the one in suit:

“Second. That it does not appear in and by said plea that the said town at that time had no money in its treasury to meet this indebtedness:

“Third. That it does not appear in and by said plea that the said town at that time would be unable to meet this indebtedness from its current revenues.”

This demurrer was sustained by the Presiding Justice of the Superior Court, and to this ruling the defendant took no exception. Accordingly when the defendant at the trial of the case before the jury offered evidence tending to show that the town had exceeded its debt limit, the trial judge ruled in accordance with the said decision of the Presiding Justice on the demurrer, and excluded the evidence offered as immaterial. We think that, if the defendant desired to bring this question before this court, it would have been the proper course of procedure to have reserved exception to the ruling on the demurrer; and to have brought such exception

before us in its regular course. But the defendant, not following such procedure, saw fit to attempt to offer such evidence, under the general issue, and now insists that such evidence, showing that the plaintiff's claims are wholly void, was properly admissible under the general issue, in accordance with the liberal rules governing pleading in this State. Without deciding this question, however, on technical grounds, we think that, in view of the importance to the towns of this State of the question as to the admissibility and effect of such testimony, and in view of the novelty of the question in this State, we are justified in treating the question as fairly before us on the specific exception; and we proceed therefore to its consideration.

- It is to be observed at the outset that, as to the services of the plaintiff, here in suit, as Chief of Police and Town Sergeant, such services fall naturally and inevitably within the class of services properly and necessarily incidental to the ordinary daily affairs of a municipal corporation, and that the compensation therefor naturally and inevitably
- (1) falls within the current expenses of such a corporation. As to the services rendered as dog officer, it is to be observed that Chap. 135, Gen. Laws, 1909, "Of Dogs," by Section 12, provides as follows: "The town sergeant of each town or such special constables as the town council of such town may appoint, annually in the month of April shall ascertain and make a list of the owners or keepers of dogs in such town and return such list to the town clerk on or before the last day of May, and shall receive from the town treasury the sum of twenty cents for each dog so listed," . . . ; While by Section 13 provision is made for killing dogs not licensed and a fee of two dollars for each dog killed and buried is to be paid out of the town treasury; so that by the express provisions quoted, it is made one of the annual duties of the town to make such a list of owners of dogs, and the fees therefor and for killing and burying are expressly fixed by law and payment therefor is expressly provided to be made out of the town treasury. Such service is therefore to be

- (2) deemed to be properly and necessarily incidental to the management of the affairs of the town as a proper police regulation, and the compensation therefor fixed by law must be deemed to be one of the current expenses of the town.

The question here involved has never been squarely brought before this court, but it was, among other questions, incidentally considered in the case of *McAleer v. Angell*, 19 R. I. 688, where upon a suit in *assumpsit* to recover for stone furnished the town of North Providence, by the plaintiff, the defendant filed a special plea in bar setting up that "at the time of contracting said debt the said town had incurred debts to the limit allowed by law, and also that there was no money in the hands of the defendant town treasurer at that time, nor has there been any money in his hands at any time since then, with which said debt could have been paid.

"To this plea the plaintiff demurs on the grounds: (1) that it is bad for duplicity; (2) that the fact that the town had reached its debt limit is not a good defence, because the duty of the town to keep its highways in repair is a statutory one, and it is not suspended by reason of the fact that the town had reached its debt limit; (3) because, as the town council of said town, on October 22, 1894, allowed the plaintiff's claim and ordered it paid, the town is estopped from denying the validity thereof.

"We do not think the plea is bad for duplicity. A double plea is one which consists of several *distinct and independent* matters alleged to the same point and requiring different answers. Gould's Pleading, page 420. But this rule is not violated by introducing several matters into a plea if they be constituent parts of the same entire defence. 1 Chit., page 512; *Handy v. Waldron*, 18 R. I. 567. Without the allegation objected to in the plea before us it would not state full defence to the action, and hence would be demurrable, because notwithstanding the fact that the town had reached its debt limit when this bill was contracted, yet there might have been money in the treasury at that time which had been specially set apart for the payment of claims like the one

in suit; and if the town had the means in its treasury to meet this indebtedness, or would have it in anticipation of its current revenue, the contracting of the liability, even though the town then was up to its debt limit, would not be a violation of the statute. Dill. Mun. Cor. 4 ed. § 135; *Dively v. Cedar Falls*, 27 Ia. 227 (232); *Barnard v. Knox County*, 105 Mo. 382 (391)."

It is to be noted that the plea which was held good in *McAleer v. Angell*, *supra*, goes far beyond the plea in the case at bar, in that it sets up not only the excess of the debt limit, but also that there was not and never had been money in the hands of the defendant to pay the claim.

The principle above incidentally alluded to and approved in the case cited, has frequently been followed in other states. In the case of *Grant v. City of Davenport*, 36 Ia. 396, an ordinance permitted the formation of a water company by certain persons, and granted to the company a privilege to supply water to the city for a term of years; and provided for payment of certain annual sums for fire-hydrants and other service for a series of years. Upon a suit in equity brought by citizens and taxpayers to restrain the defendant from carrying the ordinance into effect, because the city would thereby exceed its legal debt limit, the court, after setting forth constitutional provisions limiting the powers of the defendant to incur debts, and the necessity and propriety of providing for a water supply for domestic purposes and fire protection, proceeds to the discussion of the effect of the ordinance and the powers of the defendant, as follows:

"But, if it can induce individuals or a corporation to construct and maintain such works for the use and benefit of the municipality and its inhabitants, and can pay a just and fair rent, as agreed, out of its current revenues, and can also, out of such revenues, pay its other ordinary expenses, we can see no sufficient reason for holding that an agreement to pay such rent either weekly, monthly, quarterly or annually, creates an indebtedness against the city. If it did create an

indebtedness, then an ordinance providing for the payment of the salaries to the officers of the city would also create an indebtedness and would be invalid, where the maximum of indebtedness has already been reached. And such construction would also render invalid every contract for the delivery of lumber to repair a bridge or a sidewalk, or for the hauling of gravel to repair a street, or for the employment of a laborer to work thereon.

“And, to carry the illustrations further, it is very manifest that a city, already indebted to its maximum limit, could not purchase, upon credit, real property with buildings thereon, suitable for its offices, council room, etc.; nor could it, having the real estate, make valid contracts upon its credit for the erection of such buildings; nor employ laborers to put up such buildings, and issue daily, weekly or otherwise, its warrants for such labor, where its cost is manifestly above the amount it can pay out of its ordinary current revenue, and at the same time defray its other necessary and current expenses. But it may rent such real estate and buildings for a like use, and agree to pay, at fixed periods, a reasonable rent, not exceeding, with the other expenses, its ordinary current revenue; and such a contract for payment of rent would not be creating an indebtedness, for it is in effect a cash transaction, where the payments are made *pari passu* with the accumulation of the rent; and the length of time the contract is to continue, whether it be for thirty days or thirty years, does not alter its effect.

“Suppose a man having a family to support and is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at \$300 per year, or \$3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of \$3,000? Does any fair or legitimate meaning of the word ‘indebtedness’ or indebted, or does any general acceptance of its meaning require us to affirm that he is indebted?

We think not. Or, if instead of renting a house, he should contract for the board of his family for a like term, at \$1,000 per year, does he thereby become indebted in the sum of \$10,000? It seems to us not.

"From these illustrations, as well as from the plain and practical meaning of the language of the constitutional inhibition, the true rule and just interpretation is evolved, to wit: that where the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenue and such special taxes as it may legally, and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provisions. *Dively v. The Town of Cedar Falls*, 27 Iowa, 227."

The principle above set forth was cited with approval in Appeal of the City of Erie, 91 Pa. St. 398, 403, although not applied, because the facts shown of record did not warrant such application.

Again in the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, very similar in scope to the case of *Grant v. Davenport*, *supra*, where tax-payers attempted to enjoin the city from carrying out a contract for municipal water-supply at an annual expense of \$6,000 for a period of twenty years, the court after setting forth the facts showing the resources of the city and its annual revenue sufficient to pay all its current annual expenses, including the water-rent of \$6,000 per annum, and setting forth the provisions of law limiting its capacity to incur corporate debt, and reviewing a number of cases, proceeds as follows (p. 12):

"We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant v. City of Davenport*, *supra*, from the cases in which property is purchased or

subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses, payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors. *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 Iowa, 515; *Grant v. City of Davenport*, *supra*. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there can not be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning, suppose a laborer is employed on the first day of April to render services on the first day of May, that on the day of the employment there is no money in the treasury, but on the first day of May, when the services are rendered, there will be more than enough yielded by the current revenues, there is in such a case really no debt. Again, suppose that on the first day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other; they simply devote to current expenses current revenues. While as decided in *Sackett v. City of New Albany*, *supra*, the debt can not be made to exceed the constitutional limit even for the current expenses, no matter how urgent, yet current revenues as they come in may be used to defray such expenses,

and if they are sufficient for that purpose, then no debt is created.

“If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness, but that is not the case here. So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt, but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment.

“If a different view be taken from that which we maintain startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary, could such a merchant in making out his tax-list deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take, again, the same supposed case, and would any one say that the merchant’s solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take, for another example, the case of a private corporation, actively engaged in business, could it be pushed to the wall on the ground that it was insolvent, by evidence that it had contracted with a large number of men for a year’s service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation—and here there need be no supposition—with its officers (some of them with terms of several years), its

policemen and its firemen, is it indebted, at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit, would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are rendered or the things actually furnished. Expenses of such a character should be deemed incidental expenses of the corporate business, and not debts, and as long, at least, as the current revenues will pay these expenses without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the constitution."

The same general principles have been fully recognized, and applied or not, according to the facts developed, in the following cases: *Smith v. Town of Dedham*, 144 Mass. 177; *Barrett v. City of East St. Louis*, 89 Ill. 175; *Brashear v. City of Madison*, 142 Ind. 685; *City of Terrell v. Dessaint*, 71 Tex. 770; *Hull v. Ames*, 26 Wash. 272; *Town of Kankakee v. McGrew*, 178 Ill. 74; *Water Works Co. v. Carterville*, 142 Mo. 101; *McNeal v. City of Waco*, 89 Tex. 83; *City of Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 20.

- The sum of \$275.40, more than one-half of the plaintiff's claim in suit, is for his statutory fees as dog-officer in making the list of dogs, etc., under the provisions of Chap. 135, Sec. 12-13 above quoted. As to this portion of his claim, which
- (3) is fixed by law as compensation for a duty imposed by law, it is well settled that the question of whether or not the town has exceeded its debt limit has no application; this was recognized in the case of *McAlee v. Angell*, 19 R. I. 688, 692, *supra*, and is also recognized in *Lewis v. Widber*, 99 Cal. 412; *Bloomington v. Perdue*, 99 Ill. 329; *Town of Kankakee v.*

McGrew, 178 Ill. 74; *Smith v. Town of Dedham*, 144 Mass. 177, 180; *Security Co. v. Baker County*, 33 Or. 338.

(4) In view of all these cases, and of the principles therein so clearly set forth, this court is of the opinion that the evidence offered to show that the debt limit of the town of Cranston had been exceeded was immaterial, in the absence of proof showing that the town had not the means in its treasury to pay the claims or that it would not have the means from its current revenues.

Defendant's counsel cites a few cases wherein there are some expressions of opinion which are claimed to be opposed to the doctrines above set forth; to the effect that even current expenses, or statutory fees and compensation fixed by law cannot be provided for out of current revenue, where the debt-limit has been exceeded.

In *State ex rel. &c. v. City of Helena*, 24 Mont. 521, where a contract for water-supply was under consideration, providing for large payments per month for a term of years, and where the constitutional prohibition was against a city becoming indebted in any manner or for any purpose, in excess of certain fixed limits, it was found that by the terms of the contract the city would "become indebted" in excess of the prescribed limits, and so that the contract was void. But it expressly distinguishes the case from that of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, where the Supreme Court of the United States, considering a contract for municipal water-supply, in discussing limitations as to incurring debts, under the charter of the city of Walla Walla, says at p. 20: "The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation."

The case *Lake County v. Rollins*, 130 U. S. 662, cited by defendant's counsel, preceded the Walla Walla case by several years, and it was a suit on numerous county warrants, issued for various expenses, when there appears to have been no money to pay them, and when the debt limit had already been exceeded; and the court found the warrants to be void; but this case is cited and expressly distinguished from the *Walla Walla case*, (172 U. S. p. 21).

In *Doon v. Cummins*, 142 U. S. 366, also cited by defendant, where it appeared that a certain school district issued and sold refunding bonds, the proceeds of which were to be used for refunding an old debt, but were not in fact so used, the court found under the provisions of the constitution of Iowa that the issue was the present creation of a debt in excess of the debt limit and the bonds were held void. The case has no application here.

The cases of *Buchanan v. Litchfield*, 102 U. S. 278, and *Litchfield v. Ballou*, 114 U. S. 190, involved the question of the validity of the issue and sale of certain bonds for the purpose of raising money to build water-works; and the court found that they were issued in excess of the debt limit prescribed by the constitutions of Illinois and were void. The cases have no application here.

The case of *Prince v. City of Quincy*, 105 Ill. 138, relates to the validity of a municipal contract for water-supply, under the constitution of Illinois, in all respects similar to the case of *State v. City of Helena*, *supra*, and is decided on the same principle, and is quite inapplicable to the case at bar. The case of *Commissioners v. Gillett*, 9 Okla. 593, also cited by defendant, expressly recognizes (p. 602-3) the validity of county warrants issued for current expenses in anticipation of taxes already levied, although the debt limit had been exceeded; in short, we find nothing in the cases cited by the defendant which in any way disturbs our conclusion above reached, in view of the numerous authorities cited and from which we have quoted, that, under the facts and circumstances of this case, the evidence offered by the defend-

ant relating to the debt of the town of Cranston was immaterial. The exception relating to the exclusion of this testimony is therefore overruled.

- (5) The next exception relates to the testimony offered by the defendant's counsel, that there was no appropriation made by any proper authority, from which payment of the plaintiff's claim could properly be made. Defendant's counsel offered himself as a witness as to the facts, without attempting to produce, or to account for the lack of, record evidence on this point, where it was quite evident that such record evidence could and should have been produced, if it existed. It is quite manifest that it would have been error to allow him to offer his oral evidence of such matters. 3 Elliott Ev. § 1942; *Owings v. Speed*, 5 Wheat. 420; *Hutchinson v. Pratt*, 11 Vt. 402; *Gilbert v. New Haven*, 40 Conn. 102; *Morrison v. Lawrence*, 98 Mass. 219, 221. This exception is overruled.

The only other exception is to the direction given by the trial judge, to the jury, to return a verdict for the plaintiff; the evidence before the jury was quite sufficient to warrant such a direction; in fact there was no evidence admitted, or competent evidence offered, which in any way questioned or controverted the plaintiff's evidence.

We find no error; the exceptions alleged by the defendants are all overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the verdict for the plaintiff.

Benjamin W. Grim, for plaintiff.

John P. Brennan, for defendant, on the appeal.

ISAAC W. BAGLEY vs. WILLIAM M. LEE, City Treasurer.

JUNE 29, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Municipal Corporations. Statutory Fees. Debt Limit.*

Opinion in *Trainor v. Lee*, 34 R. I., 345, that as to fees fixed by statute, as compensation for a duty imposed by law, the question of whether or not a

town has exceeded its debt limit has no application, approved and followed.

(2) *Municipal Corporations. Claims Against Town.*

A claim for repairing bicycles of and used by police officers in the performance of duty was approved and ordered paid by a town council. Such repairs had been customary and had been frequently made by plaintiff and paid for by the town. Defendant offered no evidence in dispute of the claim:—

Held, that a motion for new trial after verdict for plaintiff, was properly denied.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action of assumpsit. The suit was commenced in the District Court of the Eighth Judicial District and, on the entry day of the writ, a jury trial was claimed by the plaintiff. The case was tried before a justice of the Superior Court and a jury on October 23rd, 1911, and said jury returned a verdict for the plaintiff for the full amount of his claim, viz.: two hundred eighty-three dollars (\$283.00).

The defendant filed a motion for new trial and the same was denied. The case now comes before this court on a bill of exceptions.

There are only two exceptions before this court, to wit, the exception to the refusal of the lower court to grant the defendant's motion for a new trial and the exception to the exclusion of certain testimony noted on page 10 of the transcript.

The plaintiff was appointed dog officer of the town of Cranston on the second day of April, A. D. 1909, qualified on the third day of April, and during said month made a list of all the owners of dogs of said town, to wit, eleven hundred and ninety, for which the statute provides the payment of the sum of twenty cents for each dog so listed (Chap. 135, § 12, Gen. Laws, 1909). A list was made out by him and delivered to the town clerk as directed by the statute; his bill for said services was presented to the town council and ordered paid. The balance of the plaintiff's claim, amount-

ing to the sum of ten dollars and twenty-five cents, was for repairing bicycles belonging to the police officers of the town and used by them while in the performance of their duties. The plaintiff performed similar services before and subsequent to the date of contracting of this bill, and the same were paid for out of the regular appropriation for police. This item is a part of his claim approved in the account which he presented to the town council and which was ordered paid. There was no dispute about the amount or the reasonableness of the entire claim, or any part thereof. In fact the city solicitor, during the trial of this case, admitted that "the man who did this work is entitled to be paid for it."

- (1) The defendant by special plea to the effect that the town of Cranston was indebted in excess of its debt limit of four per cent. of the taxable property of the town (see Chap. 1428, Jan., 1895), attempted to claim that the town had no authority to contract for the services of the plaintiff, because the amounts coming due to the plaintiff would be in excess of the debt limit, thereby attempting to raise the same question as was chiefly relied upon in the defence of the case of *Trainor v. Lee* (34 R. I. 345), recently decided. For the reasons set forth in the opinion in that case, we think the court in this case properly refused to admit testimony regarding the debt limit. And inasmuch as the greater part of this plaintiff's claim is for enumerating and making the list of dogs required by statute, as referred to in the *Trainor* case, the same applies to this case, as to the greater part of the plaintiff's claim.
- (2) As to the small amount of \$10.25 claimed for repairing the bicycles of policemen, it appears that such repairs were customary, and had been frequently made by this plaintiff and paid for and that his bill with this item included was duly presented to the town council and was allowed by it in regular course of business. There was no evidence offered by the defendant, nor does any such evidence appear in the record, in support of its special pleas, nor in dispute of the

correctness and justice of the plaintiff's claims; the evidence fully supported the verdict, and the court below did not err in refusing a new trial.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment on the verdict for the plaintiff.

Benjamin W. Grim, for plaintiff.

John P. Brennan, for defendant, on the appeal.

JULIA M. VAILL vs. DONALD T. MCPHAIL *et al.*

JULY 2, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Appeal and Error. Equity.*

Under Gen. Laws, 1909, cap. 289, providing that any party aggrieved by a final decree, entered in the Superior Court in an equity cause may appeal to the Supreme Court, it is not the intent of the statute to remove the cause by appeal to that court for a re-trial, but merely for the purpose of reviewing the errors stated in the appellant's reasons of appeal.

(2) *Appeal and Error. Equity. Stating Reasons of Appeal.*

In equity appeals the appellant should clearly indicate in his reasons of appeal the particular errors of the Superior Court of which he complains and which he seeks to have reviewed. These reasons should be stated separately and specifically, and should consist of a statement of the erroneous rulings, orders or decrees to which the appellant objects, and not of the reasons upon which he bases his claim of error.

(3) *Appeal and Error. Equity. Stating Reasons of Appeal.*

The statement of reasons of appeal in equity causes, of exceptions in a bill of exceptions and the assignments of error in an application for a writ of error are of the same nature and subject to the same requirements.

(4) *Appeal and Error. Equity.*

The rule adopted in *Blake v. Atlantic Natl. Bank*, 33 R. I. 109, and *Dunn Mills v. Allendale Mills*, 33 R. I. 115, with regard to the form of statement of exceptions in a bill of exceptions is applicable to the form of reasons of appeal in equity causes.

(5) *Appeal and Error. Equity.*

A claim of appeal in equity alleged that the decision of the justice upon which the final decree was based was (a) erroneous and against the evidence; (b)

against the law; and that the final decree was (a) against the evidence and (b) against the law:—

Held, that the reasons of appeal set out that the determination of the court upon the facts was not warranted by the testimony and his application of equitable principles to the facts as he found them was erroneous; that the reasons were not indefinite and were sufficiently specific and to the consideration of such alleged errors appellants would be restricted.

(6) *Probate Appeals.*

Semble: While the statute in regard to probate appeals provides that the appellant shall be restricted to his reasons of appeal specifically stated, yet in practice due to the nature of the proceedings, the trial in the Superior Court in most cases is essentially *de novo*. When the subject matter and the appellant's relation to it permits, although the moving party in the probate court continues to be the moving party in the Superior Court, the trial in the latter court is restricted within the limits fixed by the reasons of appeal.

BILL IN EQUITY. Heard on motion of complainant to dismiss respondents' appeal, and denied.

SWEETLAND, J. The cause is before us at this time upon the complainant's motion to dismiss the respondents' appeal from the final decree of the Superior Court on the ground that the respondents did not file a sufficient statement of their reasons of appeal as required by the statute.

The complainant in her bill of complaint seeks to have two mortgages upon her property in the town of New Shoreham, purporting to be executed by her and delivered to the respondent McPhail, delivered up to be cancelled. She asks this relief on the ground that if she did execute said mortgages she did so unwittingly and without consideration, at the request of the respondent Barton, who was acting as her confidential agent; that she was influenced wholly by her implicit trust and confidence in said Barton, and that the respondent McPhail, at the time of the delivery of said mortgages to him, had full notice of these facts.

At the conclusion of the hearing in the Superior Court upon the bill, answer, replication and proof the presiding justice gave an oral decision from the bench. He decided that a confidential relationship between the complainant and the respondent Barton was established; that the re-

spondent McPhail had full knowledge of it; and the justice granted the prayer of the bill. Upon this decision a final decree was afterwards entered, in which it was decreed that said mortgages and a certain bond given by the complainant to the respondent McPhail be surrendered for cancellation and that the same be cancelled. Within the time allowed by statute the respondents filed in the clerk's office of the Superior Court a claim of appeal with a statement of their reasons therefor. The said reasons are as follows:

"First. That the decision of the justice upon which said final decree was based was erroneous and against the evidence and the weight thereof.

"Second. That said decision of the justice upon which said final decree was based was erroneous and against the law.

"Third. That said final decree is against the evidence and the weight thereof.

"Fourth. That said final decree is against the law.

"Fifth. That the decision of the justice who heard and tried said cause is erroneous and against the evidence and against the law and that said final decree based upon said erroneous decision is erroneous and against the evidence and the law."

The complainant's motion to dismiss is based upon her claim that the said reasons are indefinite and that to give this court jurisdiction more specific reasons should have been assigned.

In considering this motion we will first examine the nature of the appeal in equity causes, from the Superior Court to the Supreme Court, given by our statute. If the effect of such appeal is to transfer the whole cause to this court, here to be tried *de novo*, then the statement of the reasons of appeal may well be of a general character, simply setting forth in a formal way that the appellant is aggrieved, that he is dissatisfied with the decree entered in the Superior Court and desires to have the cause retried in this court. If, however, the appeal removes nothing to this court except

the errors appearing upon the record and complained of by the appellant, then the statement of the reasons of appeal should be specific; should be as full as the claim of the appellant and must be regarded as the jurisdictional basis of the cause in this court, limiting all subsequent proceedings here. In determining this question we get little, if any, assistance from the fact that the word "appeal" is used in the statute. Appeals are of civil law origin, early adopted into chancery procedure, and subjected the whole cause to retrial in the appellate court, differing from the common law writ of error which removed only questions of law for reëxamination.

In equity proceedings in England, appeals by that name, have existed for centuries and are of two kinds. A party aggrieved by the order or decree of the Master of the Rolls or of a Vice Chancellor may appeal to the Lord Chancellor and the Lord Justices of the Court of Appeal in Chancery. This is known as an appeal in chancery. Or the aggrieved party may appeal from the decree or order of the Court of Chancery or the Court of Appeal in Chancery to the House of Lords. While some of the qualities of each of these two kinds of appeal, the appeal in chancery and to the House of Lords, are similar, they are in many particulars quite unlike. Their differences in general terms are, that the appeal in chancery conforms rather to the primary notion of an appeal. It provides a rehearing in the appellate court with the entry of a decree as upon a trial *de novo*. An appeal to the House of Lords must contain a summary of the reasons upon which the appellant relies and it brings before the Lords the question of error in the order or decree complained of in the appellant's petition of appeal. 5 Bligh (N. S.) 714. After hearing the Lords give judgment affirming, reversing or varying said order or decree. It is the contention of the appellees that the equity appeal in this State, in its main characteristics, conforms to an appeal to the House of Lords.

The term "appeal" has been largely used in the statutes of the various states of this country as a general term to designate the proceeding for the removal of causes from a

lower to an appellate court for the purpose of review. In many instances it has been used indiscriminately with reference to the removal of suits at law as well as in equity. In some states the courts have endeavored in their interpretation of statutes to maintain the old distinction between appeal for equity and error for law review. In *Horton v. Miller*, 44 Pa. St. 256, as the relief sought was equitable, the court turned a writ of error into an appeal. In considering this matter the Supreme Court of Nebraska, in view of the uncertainty that attends an examination of the statutes and reports of the several states, said: "An examination of this question is attended with much confusion, owing to the fact that in some states all appellate proceedings are denominated appeals, while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to." *State v. Doane*, 35 Neb. 707.

In many states cases at law are removed by appeal to appellate courts and there retried, as were appeals from justice and district courts with which we were long familiar in this State. In *Mann v. Young*, 1 Wash. Terr. Rep. 454, the court held that under the civil practice act it was intended "that a writ of error shall be so amplified in use as to bring up, not merely causes of common law, but also those of equity jurisdiction." In *Farish v. Mining Co.*, 5 N. M. 234, the court held that under the statute a writ of error will lie to review a decree in equity as well as a judgment at law. While the court in *Springer's Admr. v. Springer et al.*, 43 Pa. St. 519, said: "But a writ of error cannot, without a change of its nature, become an adequate form of review of equitable remedies, because it brings up only what is properly *record*, in order to assign error in that." . . . "It is by *appeal* that equity remedies are reviewed in a higher court, and that brings up the whole case, and not merely the record of it."

There is a like diversity of statutes and decisions not only with regard to the kind of causes which are removed by

appeal, but also as to the nature of the questions carried to the appellate court, the extent of the jurisdiction of the appellate court over the cause and as to the procedure in that court.

Mason v. Alexander, 44 Ohio St. 327, was a suit at law, but we are now considering the nature of an appeal, as it exists in the various states, and the language of the court is as applicable to appeals in equity as to appeals in law. The court said: "the practice in Ohio is essentially different from the practice in other states in removing cases from general trial courts to appellate courts. While in many of the states, and perhaps in all except in our own, an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record, as to facts as well as law, does not hear additional or other evidence, but confines its adjudications to errors appearing upon the record, in Ohio the appeal itself vacates, without revisal, the whole proceeding as to findings of fact as well as law, and the case is heard upon the same or other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action *de novo*, in respect to pleadings, necessary parties, trial and judgment, in like manner as if the cause had never been tried below."

In *Pierce v. Wilson, et al.*, 2 Iowa 26, the court said: "But it must be borne in mind, that this is an appeal in chancery, and in this court, the facts as well as the law of the case, are again reviewed and re-adjudicated. *Stockwell v. David*, 1 G. Greene, 115. Upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance, consistent with the case made by the bill and sustained by the proof."

In *Durkee v. Stringham*, 8 Wis. 120, it was held "The first point that naturally presents itself, is one of practice. Some of the appellees, or Taylor, at least, as well as the appellant, Joseph Stringham, were dissatisfied with the decree of the circuit court, but neglected to take their appeal, supposing the appeal which was taken brought up

the cause for a rehearing in this court, and necessarily opened the whole case for our consideration. But it is contended by the counsel for the appellant, that this is a mistake; and that even if we should be of the opinion that the decree was not as favorable to Taylor as it should have been, still that we cannot modify or amend it to his advantage, he not having appealed. This question has been carefully considered in this case, as well as in the case of *Wood et al. vs. Spaulding*, unreported, where the same point was made and elaborately discussed by counsel. In this case, the appeal was from the whole decree, while in the case of *Wood v. Spaulding*, the appeal was only from a part of the decree; and yet, in both cases, we were led to the conclusion that the appeal to this court opened the whole case, and that it was competent to modify the decree of the court below, and make it more favorable to the appellee, if the whole merits and equity of the case required that this should be done."

In *Morris v. Richardson*, 30 Tenn. (11 Humph.) 389, it was held: "1st. This petition being regarded, by our law, as a proceeding in equity, the whole case is open before us for hearing, upon the pleadings and proof, just in the same manner as it was before the circuit judge. We hear the case on appeal, upon its merits, as if no decree had been pronounced in the court below, and make such decree as may be deemed proper, upon the whole case."

The courts of a number of other states in considering the nature of the appeal in equity given by the statutes of their respective states, have held that an appeal carried the whole case to the appellate court for retrial. *Glover v. Hedges*, 1 Saxton (N. J.) 120; *Crane v. Decamp*, 22 N. J. Eq. 614; *Decker v. Ruckman*, 28 N. J. Eq. 614; *Sparhawk v. Buell*, 9 Vt. 83; *Bishop v. Day*, 13 Vt. 116.

On the other hand it has been held by the courts of several of the states that upon appeal only the errors assigned by the appellant were carried to the appellate court for review. The editor of the American notes to Daniell's Chancery Pleading and Practice, Vol. 2, page 1459, states, that it is

this class of appeals, of the same nature as the appeal to the House of Lords, which prevails in the United States. After an examination of appellate proceedings, as they have been provided in the several states, we are of the opinion that the conclusion of the editor is somewhat too broad, although this class of appeals is provided in a number of the states.

In *Bank v. Fink*, 7 Paige 87, it was held that on an appeal from the vice chancellor the only matter before the chancellor for review is the decree appealed from. See, also, *Copous v. Kauffman*, 8 Paige, 583; *Mapes v. Coffin*, 5 Paige, 296.

In New York, under the code, appeals in equity and writs of error at law have been superseded by a proceeding called appeal. In the appellate court the action of the lower court is reviewed as in a writ of error, upon the grounds stated in the notice of appeal. *Avery v. Woodbeck*, 62 Barb. 557. In *Sharon v. Hill*, 26 Fed. 345, the court said: "The tendency during the past half century has been to assimilate proceedings in equity and law cases, and in the states where the modern code prevails, the proceeding by which a judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal." In considering the Connecticut statute, the court said: "'Appeal' is the name given a proceeding, for the revision of questions of law arising in a trial, which, prior to 1882, were brought here by motion in error or motion for new trial. The name in no way alters the nature of the proceeding. The Act of 1882 substituted such appeal in place of the former methods, authorizing the combining of both in one process. The appeal simply performs the office of the old motion for new trial and motion in error. It is entirely different from the process called appeal, which transfers a case tried in one court to another court for retrial." *White, et al. v. Howd*, 66 Conn. 266.

In *French v. Currier*, 47 N. H. 96, and *Dodge v. Stickney*, 60 N. H. 464, the court considered that it had the "right to

investigate only those questions which come within some of the reasons assigned for the appeal."

In *Baldwin v. Sutton*, 148 Ind. 593, the court said: "The law of appellate procedure requires the complaining party to specify with reasonable certainty the rulings of the lower court upon which he relies and desires reviewed, and such assignment must be supported by the record, and no error, not well assigned, can be made available."

In *Grimshaw v. Scoggan*, 72 Ill. 103, the court stated that an appeal from the circuit to the Supreme Court only brings in review the decision of the lower court, and a trial *de novo* on such appeal is unknown in practice. See, also, *Hulett v. Ames*, 74 Ill. 253; *Rockford v. Compton*, 115 Ill. App. 406.

Other cases in which courts have taken a like position in regard to proceedings upon appeal are *Carlin v. Jones, et al.* 55 Ala. 624; *Proctor v. Robinson*, 35 Mich. 284; *Ireland v. Miller*, 71 Mich. 119; *Blackie v. Cooney*, 8 Nev. 41; *Cain v. Williams*, 16 Nev. 426; *Shook v. Colohan*, 12 Ore. 239; *Clancey v. Clancey*, 7 N. M. 405.

Some of the cases cited have been actions at law, but they equally well illustrate the diversity in the nature of the proceedings which have been denominated "appeals" in the different states. The word "appeal" as used in the various statutes has in many instances lost its original significance and has become a general term designating appellate proceedings. Appeals in the United States cannot be said to have a general character, but each depends for its form and nature upon the particular statute which created it. In *Rockford v. Compton*, 115 Ill. App. 412, the court gave its approval of the following statement as to the nature of an appeal: "The mere use of the word 'appeal' in a statute furnishes no certain guide to its precise meaning and effect, but to determine its operation, resort must be had to the general policy of the law, and to reasons drawn from analogy and from the practical consequences of applying one interpretation or another."

We have reviewed at this length the character of appeals in England and in this country, because up to the time of the passage of the Court and Practice Act the appeals known to practice in our State courts, provided for a retrial of the cause.

Some question as to this might be raised in regard to probate appeals. Any person aggrieved by an order or decree of a Probate Court which operates on his rights of property or bears directly upon his interest may appeal therefrom to the Superior Court. The statute requires that the appellant shall file in the Superior Court his reasons of appeal, specifically stated, to which reasons in ordinary cases, the appellant will be restricted. The Superior Court however is not a court for the review of error. The appeal is taken to a single order or decree of the Probate Court, and although, by the terms of the statute, the appellant is restricted to the reasons of appeal specifically stated, unless the subject matter of the decree appealed from is separable, as in the case of an account, the nature of the proceeding necessitates a retrial of the matter upon which that particular order or decree was based. The rules of practice of the Superior Court, approved by this court, provide that in appeals the same party shall hold the affirmative in the Superior Court who held the affirmative in the Probate Court.

The notion of an appeal most common among us is of a proceeding providing for a trial in the appellate court, essentially *de novo*. Previous to the passage of the Court and Practice Act, equity jurisdiction was vested in the Supreme Court alone; by the terms of that act original equity jurisdiction was conferred upon the Superior Court and provision was made for an appeal to this court. Before that time, from 1867 to 1871, appeals in equity causes had existed in our practice, but not from an inferior to the Supreme Court, Chapter 692 of Acts and Resolves, passed March 15, 1867, provided that equity causes should be heard and determined in the first instance by one justice of the Supreme Court; that any party aggrieved by any interlocutory or final

decree made by said justice might appeal to the full court. The intention of the statute appears to have been that upon an appeal to the full court from a final decree made by a single justice, the entire cause was to be transferred to the full court by it to be reheard, in ordinary cases upon the same evidence which had been presented to the single justice. There was no provision in the statute requiring the appellant to file a statement of his reasons of appeal or in any other way to bring upon the record an assignment of error in the proceedings before the single justice, thus limiting the proceedings before the full court. This chapter was repealed in January, 1871. Equity appeals did not again appear in our practice until the Court and Practice Act went into effect in July, 1905.

- (1) Appeals in equity are now regulated by Chap. 289, Gen. Laws, 1909. It is there provided that any party aggrieved by a final decree, entered in the Superior Court in an equity cause, may appeal to the Supreme Court. The provisions of the statute do not leave entirely free from doubt the question as to the nature of the proceedings in the Supreme Court upon the appeal. Our conclusion is that it is not the intent of the statute to remove the cause by appeal to this court for a retrial. It was said by the court in *Lacy v. Williams*, 27 Mo. 280: "A trial *de novo* in the circuit court would not strictly be the exercise of appellate jurisdiction. It is clearly competent for the general assembly to confer such jurisdiction, but until it is expressly done we do not consider that the bestowal of a mere appellate power would authorize the courts to try causes *de novo*."

Certain incidental and subordinate jurisdiction over the cause is given to this court pending the appeal, but the general effect of the appeal is to bring before the Supreme Court for review merely the errors stated in the appellant's reasons of appeal. We are led to this conclusion, among other things, by the general scheme of the relation between the Superior and Supreme Courts which has been created by our law, the Superior Court being generally the trial court.

having in most cases exclusive original jurisdiction, with revisory jurisdiction in this court; further, the provisions of the statute that this court after hearing and determining the appeal shall affirm, reverse or modify the decree appealed from and shall remand the cause to the Superior Court, and the final decree, though its form may be determined by this court, shall be entered in the Superior Court. A most important consideration is the provision that together with his claim of appeal in the Superior Court the appellant shall file a statement of his reasons of appeal. Of a similar provision in the New York Code the court said in *Matter of Davis*, 149 N. Y. 548, confirming 91 Hun. 53: "Moreover, Section 13 of Chapter 399 of the Laws of 1892, provides that upon such an appeal, the notice shall state the grounds upon which it is taken, and where a statute requires the grounds of the appeal to be stated, none except those specified can be considered. The hearing must be limited to the errors noticed in the appeal. Otherwise the requirement of the statute would be without significance." See, also, *Shook v. Colohan*, 12 Ore. 239; *Avery v. Woodbeck*, 62 Barb. 557. In *Lessenich v. Sellers*, 119 Iowa, 314, the court held that under the Iowa statute an appeal in equity brings the whole case before the appellate court for retrial; and that "hence errors of any character which do not involve the power of the court to finally dispose of the case need not be assigned."

As we have discussed above, although our statute in regard to probate appeals provides that the appellant shall be restricted to his reasons of appeal specifically stated, yet in practice the trial in the Superior Court in most cases is essentially *de novo*. This is due to the nature of the proceedings; and when the subject matter and the appellant's relation to it permits, although the moving party in the Probate Court continues to be the moving party in the Superior Court the trial in the Superior Court is restricted within the limits fixed by the reasons of appeal.

Although this court has not had occasion to determine the particular point now under consideration it has in a certain aspect treated an appeal in equity as a proceeding to review solely the error assigned. In *Hazard v. Hope Land Co.*, this court by rescript filed May 11, 1908, reported in 69 Atl. Rep. 602, refused to consider the objections of an appellee to a decree from which he had not appealed. So also in *McElroy v. McCarville*, rescript filed in this court January 20th, 1909, reported in 71 Atl. Rep. 646. If, by appeal, the whole cause was before the court for retrial as in chancery appeals in England, as distinguished from appeals to the House of Lords, the objection of the appellee in each of these causes should have been considered. Lord Justice Knight Bruce in *Sherwin v. Shakspear*, 5 De G. M. & G., an appeal in chancery, at page 523, said: "I have no doubt on the point, that upon an appeal from part of a decree the whole cause is open to the respondent. He may be satisfied with the decree as it stands, but that does not prevent him from contending, if its correctness is called in question in any particular, that it should be made more favorable to him in any other." See, also, *Watts v. Symes*, 1 De G. M. & G. 240.

- (2) In conformity with our view of the nature of equity appeals in this State, we hold it essential that the appellant should clearly indicate in his reasons of appeal the particular errors of the Superior Court of which he complains and which he seeks to have reviewed. These reasons should be stated separately, and specifically. The statement of reasons of appeal which the statute requires is a statement of the erroneous rulings, orders or decrees of which the appellant complains. It is not a statement of the reasons upon which the appellant bases his claim of error. We regard the statement of reasons of appeal in equity causes, the statement of exceptions in a bill of exceptions and the assignments of error in an application for a writ of error as of the same nature and subject to the same requirements. Courts have at times gone to great lengths in their insistence upon minute particularity in an appellant's assignments of error, requiring
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not only that the rulings, orders or decrees objected to should be specified, but that all the reasons upon which the appellant bases his claim of error and upon which he may rely in the appellate court should be set out. In consequence, members of the bar, not to be placed at a disadvantage by failing to comply with such rules, have filed reasons of appeal and assignments of error so diffuse as to be bewildering, and courts have been forced to adopt a more reasonable construction of statutory requirements. Thus *Wood v. Frazier*, 86 Tenn. 500, cited by the appellee, is a marked example of the extreme requirement of particularity and of an unwillingness on the part of the court to consider any assignments of error, the grounds of objection to which were not specifically set forth. Yet in *Bleidorn v. Pilot Mountain*, 89 Tenn. 214, we find Mr. Justice Lurton, then an associate justice of the Supreme Court of Tennessee, saying: "We have construed the rule requiring assignments of error with liberality, and to hold that a good assignment is rendered bad by the insufficiency of the reasons advanced in its support would be highly technical and a sticking in the bark."

Houston v. Blythe, 71 Tex. 719, also cited by the appellees, is a case in line with *Wood v. Frazier* (*supra*), but later the Supreme Court of Texas in *Land Co. v. McClelland Bros.* 86 Tex. 192, said: "Where an assignment of error is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held good, although it should fail to state the reason why such ruling is claimed to be erroneous. An assignment may be brief and yet specific, and brevity in such a case is commendable and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief, under and in support of the respective assignments." See, also, *Cotton Press Co. v. McKellar*, 86 Tex. 700.

A good statement of the proper rule to be observed in assignments of error, which is applicable to reasons of appeal,

is contained in *Atchison v. Meyers*, 76 Fed. 444. "In the interest of brevity and clearness, it is to be observed that the assignment of error in this record contains much redundant and irrelevant matter. The first specification is that the 'court erred in denying defendant's motion at the conclusion of all the evidence to instruct the jury to find a verdict for the defendant.' That would have been enough, because it states succinctly just what action is alleged to have been erroneous. But there follows a statement at length of four reasons why the motion should have been sustained. They constitute a good brief, but in the assignment of error are irrelevant."

- Other cases in the same line are—*Sneer v. Stutz*, 93 Iowa, 62; *Davis, Collector v. Burnett*, 7 S. W. 678; *Gilman, Adm'r v. Donovan*, 59 Iowa, 76; *Eslava v. Lepretre*, 21 Ala. 526; *Piper's Appeal*, 20 Pa. St. 67; *Ermentrout v. Insurance Co.*, (4) 60 Minn. 418. What we have said, in *Blake v. Atlantic National Bank*, 33 R. I. 109, and in *Dunn Worsted Mills v. Allendale Worsted Mills*, 33 R. I. 115, with regard to the form of statement of exception in a bill of exceptions is applicable to the form of reasons of appeal in equity causes.

- We come to the consideration of the respondents' reasons of appeal in the case at bar. The respondents raise no objection to any interlocutory order or decree of the Superior Court entered in the cause, nor to rulings of the presiding justice admitting or rejecting testimony during the hearing. Upon the testimony presented the justice decided the issues of fact in favor of the complainant, and upon the facts as he found them he held that the complainant was entitled to the equitable relief which she sought. On this decision the final decree was based. It is as to these matters alone that the respondents desire to have the action of the Superior (5) Court reviewed. These are the only points upon which they consider themselves aggrieved and these are the reasons for their appeal. If they clearly set out in the statement of their reasons of appeal the claim that the determination of the justice upon the facts was not warranted by the testi-

mony and that his application of equitable principles to the facts as he found them was erroneous, they have pointed out the error of which they complain and have complied with the requirements of the statute. To the consideration of the alleged errors which they have thus designated they will be restricted in the proceedings before this court.

We are of the opinion that the reasons of appeal in this case may be open to the objection of containing needless repetition; but that the reasons assigned are not indefinite or multifarious and that they are sufficiently specific.

The complainant's motion to dismiss the appeal is denied.

William A. Spicer, Jr., Eugene A. Kingman, Edwards & Angell, for complainant.

Willis B. Richardson, Frank H. Hammill, for respondents.

CHARLES K. CLARKE *et al.* vs. WILLIAM H. JOSLIN *et al.*

JULY 3, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Elections. Ballots. Quo Warranto.*

Where in a petition in equity in the nature of *quo warranto* bringing in question the title to the offices of town council and tax assessor, it appeared that the town council did not mark as "defective" the rejected ballots, nor separate them, but placed all the ballots in a sealed package, the court cannot open the package and review the action of the town council, as the ballots cannot be identified, nor upon the allegations in the petition, assume the functions of the town council and recount the vote.

(2) *Elections. Ballots. Quo Warranto.*

Upon a petition in equity in the nature of *quo warranto* bringing in question the title to the offices of town council and tax assessor, without examining the ballots, evidence of witnesses as to the "defective" ballots heard and:—
Held, that more than 16 and less than 25 ballots cast for petitioners were illegally rejected and claims of certain of petitioners to the offices sustained.

(3) *Elections. Ballots. Distinguishing Mark.*

A ballot having one line of the (X) crossing, but not extending to the same length as the other line, producing a mark to a certain extent resembling the letter "Y," is not invalid as constituting a distinguishing mark.

(4) *Elections. Ballots. Distinguishing Mark.*

A ballot having a so-called "hook" consisting of a slight curve at the top of one of the lines forming the (X), is not invalid as constituting a distinguishing mark.

PETITION IN EQUITY in nature of *quo warranto*. Relief granted.

SWEETLAND, J. This is a petition in equity in the nature of *quo warranto* brought under the provisions of Chapter 328, Gen. Laws, 1909. It brings in question the title to the offices of first, third, and fourth member of the town council and of the assessor of taxes for three years in the town of Scituate.

At the annual election of the town officers in said town, held on May 15, 1912, the petitioners were the regular republican candidates for said offices as follows: Charles K. Clarke, Frank F. Brown and Joseph B. Round were candidates for the offices of first, third and fourth member of the town council, respectively, and Benjamin Wilbur was a candidate for the office of assessor of taxes for three years. At said election the respondents, William H. Joslin, Frank H. Wilbur and George O. Rathbun were the regular democratic candidates for the offices of first, third and fourth member of the town council, respectively, and Manuel F. Williams was the regular democratic candidate for said office of assessor of taxes for three years. There were no other candidates for either of said offices. At the official count of the ballots cast at said election, made by the town council, the respondent, William H. Joslin, was declared elected to the office of first member of the town council by a majority of one vote; the respondent, Frank H. Wilbur, was declared elected to the office of third member of the town council by a majority of fourteen votes; the respondent, George O. Rathbun, was declared elected to the office of fourth member of the town council by a majority of twenty-six votes; and the respondent, Manuel F. Williams, was declared elected to the office of assessor of taxes for three years by a majority of fifteen votes.

The petitioners claim that the town council in making its official count refused to count in favor of the petitioners certain ballots, "in each instance approximately twenty-six ballots," which were legally cast at said election in favor of the petitioners. It appeared at the hearing upon this petition that said town council did refuse to count certain ballots cast at said election in favor of the petitioners, on the ground that the elector casting each of said ballots had placed a mark upon his ballot by which it might be afterwards identified as the one voted by him.

- The said town council did not mark as "defective" the said ballots so rejected by them, nor did they separate said ballots from the others cast at said election; but placed all the ballots cast in each voting district in the town in separate sealed packages. It is, therefore, impossible at this time to determine with exactness the number of ballots so rejected or to identify them, so that the court may scrutinize the so-called distinguishing marks, which said town council determined that the voters had placed upon these ballots. In the circumstances of the matter we consider the action of the town council as most reprehensible in thus mingling the ballots which were counted with those rejected, and placing this obstacle in the way of a review of their action by the court. The petitioners have offered in evidence these sealed packages and have requested the court to open the packages and recount the votes cast at said town election.
- (1) We cannot do that in this proceeding. By the allegations of their petition and by their testimony before us the petitioners contest the title of the respondents to the offices in question on the ground that certain ballots, about twenty-six in number, cast in favor of the petitioners were not counted, on the ground that they bore what were called distinguishing marks. Under this claim we would examine the ballots if they could be identified and presented to us; and from such inspection we would review the legality of the action of the town council in thus rejecting them. But, because it is impossible to present that evidence to us, we

cannot search through the packages and select a number "approximately twenty-six" which upon conjecture we conclude are the ballots rejected, and then inspect the marking upon the ballots so selected. Neither can we upon the allegations in this petition assume the functions of the town council and recount the whole number of votes cast at said election.

We have permitted the parties to present the testimony of witnesses who represented the petitioners and the respondents before the town council and who were permitted to examine the ballots at the time they were rejected. We have also received the testimony of members of the town council. These witnesses have testified as to the number of ballots cast for the petitioners which were rejected and they have testified as to the nature of the so-called distinguishing marks. It was testified to by witnesses for the petitioners and not denied that the number of ballots rejected were seven in voting district number 1 and nineteen in voting district number 2; that of this number all but two or three were ballots cast for the petitioners. We therefore find that twenty-three or twenty-four votes cast for the petitioners were not counted. From the testimony presented on both sides it appears that nearly all the twenty-six votes rejected were so rejected because of certain so-called distinguishing marks, described as "hooks" by the witnesses. And a few were rejected because the voters had used "Y" shaped marks instead of crosses as voting marks. There was testimony given by witnesses for the respondents of other so-called distinguishing marks or of instances of failure on the part of the voter to use the voting mark prescribed by statute. Some of the witnesses for the respondents while upon the witness stand, reproduced upon paper these distinguishing marks as they remembered them to be. As to some of these marks the action of the town council in not counting the ballots appeared proper; but it was clear from the testimony that more than sixteen of the ballots cast for the petitioners were rejected because of the so-called

(2)

"hooks" and "Y" shaped voting marks. From the testimony of the witnesses and the drawings which some of them made, we are of the opinion that the so-called "hook" was not a mark placed upon his ballot by the voter by which it might afterwards be identified as the one voted by him.

- (3) This so-called "hook" consists of a slight curve at the top of one of the lines forming the cross. It is such a curve as might naturally and unintentionally be made by a voter, by a slight turning of the pencil, in making the lines of the cross; probably in most instances in making the first line drawn.

- (4) We are of the opinion that the so-called "Y" shaped mark made by some of the voters in marking their ballots was a compliance with the requirements of the statute as to the form of voting mark. The statute provides that one line crossing another at any angle shall be deemed a valid voting mark.

By the testimony of witnesses for the petitioners and from the drawing of these marks upon paper by the respondents' witness, Mr. Angell, president of the town council, it appeared that this mark was made by one line crossing another, but not extending to the same length as the other; thus producing a mark which to a certain extent resembled the letter "Y." From the testimony and the drawings made by other witnesses for the respondents the lines did not cross, but from a consideration of all the testimony we find that in these marks there was a crossing of the lines. As we are not enabled to examine the marks themselves, even upon less convincing testimony than that presented to us in favor of counting these ballots, we should refuse to defeat the intention of the voter upon this ground.

We therefore find that more than sixteen and less than twenty-five of the ballots which were cast for the petitioners at said election were illegally rejected by the town council and not counted for the petitioners. In this state of the facts the claim of the complainant, Round, as to the office of fourth member of the town council is not supported. So

far as the petition relates to the office of fourth member of the town council we find that the respondent, George O. Rathbun, was elected to that office and is entitled thereto. As to that office the petition is denied and dismissed.

As to the petitioners, Clarke, Brown and Wilbur, we find that they were elected to the offices of first member of the town council, third member of the town council, and assessor of taxes for three years, respectively, and that each is entitled to said office respectively.

A decree may be entered on July 6th, at ten o'clock A. M., in accordance with this opinion.

Wilson, Gardner & Churchill, for petitioners.

Willis B. Richardson, Arthur E. Munro, for respondents.

SANITARY OYSTER CARRIER & COMMISSION CO. *vs.* THE
WM. M. MERWIN & SONS CO.

JULY 6, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Exceptions. Final Decision.*

Where on a declaration containing several counts, a demurrer is sustained to one count and overruled as to the others, the decision of the Superior Court sustaining the demurrer being a "decision prior to trial," cannot under Gen. Laws, 1909, cap. 298, § 24, be brought up on exception until "after verdict or final decision on the merits."

(2) *Pleading. Several Counts.*

In legal theory each count in every declaration is in effect a separate and distinct suit upon a different cause of action.

ASSUMPSIT. Heard on exceptions of plaintiff. Dismissed without prejudice.

PARKHURST, J. The plaintiff filed a declaration in assumpsit for breach of a contract in writing, in four counts, to which the defendant demurred. The demurrer was over-

ruled in the Superior Court, as to the first three counts, and was sustained as to the fourth count; thereupon the plaintiff excepted to the decision of the court in sustaining the demurrer to the fourth count, and has brought its bill of exceptions to this court, although there has been no "verdict or final decision on the merits."

Plaintiff claims that it should be heard in this court on its exceptions, because it is apparent on the face of the declaration that the fourth count sets forth a distinct and separate cause of action from those set forth in the other counts, and that it might have brought a separate suit thereon; and that therefore the decision sustaining the demurrer to the fourth count is, in effect a "final decision," which will prevent it from offering testimony at the trial on the claim for future profits set up in the fourth count; and that it ought to be allowed to have the question of the sufficiency of the fourth count settled before it goes to trial on the whole declaration, so that all its lawful claims may be tried at once; otherwise, if it tries only its claims on the first three counts, it may still be entitled to another trial on the fourth count, in case it shall be finally determined in this court that its fourth count sets up a good cause of action.

- (1) But the matter involved here is a question of the jurisdiction of this court under Gen. Laws, R. I. 1909, Chap. 298, § 24 (which is a reenactment of C. P. A., § 497), and which reads as follows: "Sec. 24. Exceptions to decisions or rulings prior to trial shall be open to revision after verdict or final decision on the merits, but so far only as it appears to the supreme court that the verdict or final decision was erroneously affected thereby."

The decision of the Superior Court on the demurrer to the fourth count was a "decision prior to trial," and we are of the opinion that it cannot under the statute quoted, be brought up on exception to this court until "after verdict or final decision on the merits," inasmuch as our jurisdiction is controlled by the plain terms of the statute.

- (2) The argument, that the fourth count is in effect a separate and distinct suit, would apply equally well in all cases where there are several counts, some of which are held to be good and others bad on demurrer, because in legal theory each count in every declaration is in effect a separate and distinct suit upon a different cause of action; otherwise there would be no force in the practice of filing more than one count in a declaration.

In the case of *McDonald v. Providence Telephone Co.*, 27 R. I. 595, it appears from the papers in the case that a similar decision was made sustaining a demurrer to the second count of the declaration; and the plaintiff brought his bill of exceptions to the decision; and it was held that the bill of exceptions was prematurely preferred because there had been no verdict or final decision on the merits; as required by C. P. A., § 497.

Under the law, as it now stands, we are of the opinion that this court has no jurisdiction to hear the exceptions at this stage of the case; and the plaintiff's bill of exceptions is dismissed without prejudice, and the case is remitted to the Superior Court for further proceedings.

Murdock & Tillinghast, for plaintiff. *John A. Tillinghast*, of counsel.

Tillinghast & Collins, for defendant. *James C. Collins*, of counsel.

HUGH V. CARROLL *et al.* vs. THOMAS RYDER *et al.*

JULY 1, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Reformation of Instruments. Mutual Mistakes.*

On a bill for reformation of a deed, evidence considered, and held to show a mutual mistake, justifying reformation of the deed.

(2) *Reformation of Instruments.*

On a bill for reformation of a deed, the question whether a building was actually located within the lines of the lots intended to be conveyed is unimportant where it appears that the removal of an unnecessary portion of the foundation wall would bring the building as a whole within the westerly line of one lot and also within a line drawn in continuation of that line to meet the westerly line of the other lot.

(3) *Reformation of Instruments. Rights of Attaching Creditors. Laches.*

Four years after the delivery of a deed conveying by mutual mistake of the parties the wrong premises, and prior to the filing of the bill to reform the deed, a creditor of grantor attached the lots intended to have been conveyed, without notice of grantee's equity.

Held, that as grantee filed his bill within a reasonable time after obtaining information of the mistake, he was not guilty of laches.

Held, further, that the rights of attaching creditors are determined by the state of the title at the time of attachment and in the absence of fraud and statutory regulations they only obtain the rights which the debtor had in the property at the time, for the creditor is not in the position of a *bona fide* purchaser.

BILL IN EQUITY for reformation of deed. Heard on appeal of complainant and sustained.

VINCENT, J. This is a bill in equity brought by Hugh V. Carroll and Thomas M. Carroll, doing business as Carroll Brothers, against Thomas Ryder and Elizabeth Ryder, his wife, and prays for the reformation of a certain deed given by the respondent, Thomas Ryder, to the complainants, dated December 14, 1906, and covering two lots of land, in the Town of Warwick, on what is known as the "William C. Nichols Plat."

This cause was heard in the Superior Court upon bill, answer and proofs. A decree was entered dismissing the bill and the cause is now before us upon complainants' appeal from that decree.

On December 14, 1906, Thomas Ryder, one of the respondents, by a deed of warranty, conveyed to the complainants lots 15 and 16 on the said Nichols plat. Some months later, it was discovered that the title to lots 15 and 16 was in Elizabeth Ryder, the wife of Thomas, before mentioned,

whereupon Thomas and Elizabeth, on April 12, 1907, made a deed of said lots 15 and 16 to the Carrolls, which was designed to perfect the title of the Carrolls, such intention being expressed in the last named deed.

The complainants' bill sets forth that through a mutual mistake of the parties the land intended to be conveyed by the deed of December 14, 1906, from Thomas Ryder to them was erroneously described therein as lots 15 and 16, on the Nichols plat, whereas it should have been described as lots 13 and 14 on said plat.

- (1) Upon lots 13 and 14 there was a building while lots 15 and 16 were without any improvements whatsoever.

From an examination of the record it is at once apparent that it was the original intention of both of the parties to the deed of December 14, 1906, that the one was to sell and the others to purchase, the two particular lots with which the building was associated, viz.: lots 13 and 14. This intention seems to us to be clearly evidenced both from the testimony and the circumstances surrounding the transaction. The testimony shows that the complainants were induced to make the purchase because they could use the building as a storehouse; that they occupied the premises, including both the building and the lots 13 and 14, from 1906, without any objection on the part of the respondents or any demand from them for rent; that the receipts given for the purchase money stated that such money was received for land and building; that since 1906, Mr. Ryder, one of the respondents, has himself used and occupied lots 15 and 16; Mr. Ryder, also stating at different times that he had sold to the Carrolls, the barn and two lots; and that it was intended that the Carrolls should get lots 13 and 14. Besides, the price paid for the property would be consistent with the purchase of lots 13 and 14 with the building thereon, but would be grossly in excess of the value of the unimproved lots 15 and 16.

Upon the Nichols plat a street is indicated running easterly and westerly, between the four lots mentioned, that is to say: lots 14 and 16 adjoin each other on the north side, and lots 13

and 15 adjoin each other on the south side, the two lots on one side being exactly opposite the two lots upon the other side.

This tract of land, so indicated as a street, does not appear to have been dedicated, devoted to, or used for highway purposes, nor does it appear that anyone has acquired any rights therein by way of easement or otherwise. It has always been regarded and treated as a part of the adjacent lots. In the deed of lots 15 and 16 from the respondent, Thomas Ryder, to the complainants, as well as in the later deed from both respondents to the complainants, which last named deed was designed to correct the errors of the first deed, the intervening land was particularly described as a part of the tract conveyed.

Some question has been raised as to the location of the building with reference to the westerly line of lot No. 13. The respondents contend that the building in question stands partly on the platted highway, partly on lot 13 and partly on lot 15, and that no part of said building rests upon lot 14.

- (2) In view of other facts in the case, we do not consider this contention one of importance. The foundation of the building upon the westerly side consists of a wall of very unusual width and of a width much greater than is required for the support of the structure. The removal of the unnecessary portion of the wall would bring the building as a whole within the westerly line of lot No. 13, and also within a line drawn in continuation of that line to meet the westerly line of lot No. 14.

We think, therefore, that the complainants are entitled to have their deed from Thomas Ryder of December 14, 1906, so reformed that it will carry out the original intention of the parties to the transaction, which was to convey to the complainants lots 13 and 14 upon said William C. Nichols plat with the improvements thereon, including also the land lying between said lots Nos. 13 and 14, as shown on said Nichols plat, and that upon the reformation of said deed as aforesaid

the said complainants should reconvey to the respondent, Elizabeth Ryder, lots 15 and 16 on said plat.

- (3) After the delivery, to the complainants, of the deed of December 14, 1906, and prior to the filing of their bill, to wit, on January 29, 1910, one James Watts of Utica, in the State of New York, attached lots 13 and 14 in a suit against the respondent, Thomas Ryder. On the 27th of June, 1910, Watts was made a party respondent to said bill, upon his own motion. On February 1, 1911, he obtained judgment against Ryder for \$250 and costs, in the Superior Court for the County of Kent. He now contends that the relief prayed for in the complainants' bill should not be granted to his prejudice, he having attached the lots 13 and 14 without notice of complainants' equity; that the complainants having been guilty of laches in neglecting to assert their rights for a period of four years, they are not, therefore, equitably entitled to defeat his lien upon the attached property.

An essential element of laches is knowledge. We cannot neglect that of which we have no knowledge or information. Under some circumstances the failure or omission to obtain knowledge, after such notice as might reasonably provoke inquiry, may, in itself, amount to laches.

The complainants negotiated with the respondent, Thomas Ryder, for the purchase of the storehouse building and a certain tract of land upon which such building was located. Later they received a deed of lots 15 and 16 on the William C. Nichols plat which they assumed, in the absence of any knowledge as to numbers, comprehended the land and building which had been the subject of the prior negotiations. They accordingly took possession of such building and land, and occupied it for a period of some four years without the slightest intimation or suggestion from anybody that it was not the property covered by their deed. Subsequently, the complainants learned that the lots, which they had purchased and were occupying, should have been designated as 13 and 14, instead of 15 and 16, and within a reasonable time,

after obtaining such information, they filed their bill for the reformation of the deed.

Applying the general rule, hereinbefore stated, to the above facts, we cannot find that the complainants have been guilty of such neglect as would preclude their relief in equity.

The rights of attaching creditors must be determined by the state of the title at the time the attachment was made, and in the absence of fraud and statutory regulations they only obtain the rights which the debtor had in the property at the time, for the creditor is not in the position of a *bona fide* purchaser.

The reason for this rule is that if the attachment should fail of its purpose the plaintiff would lose nothing and, having parted with no value, would be in no worse position than he was before. See 4 Cyc. 632, 633, and cases cited.

It is true that, by the record, lots 13 and 14 stood in the name of Thomas Ryder at the time of the attachment, but it is also true that they did so stand through a mutual mistake which entitled complainants to a reformation of their deed, and to this reformation they were clearly entitled at any time, after December 14, 1906, when they should discover their difficulty and make application for its remedy. If we should consider the attachment of Watts as a lien upon lots 13 and 14, which must be discharged before relief could be afforded to the complainants, it would, in effect, give them a relief coupled with a penalty which, under the circumstances of the case, would not be justifiable.

The decree of the Superior Court dismissing the bill is reversed and the cause is remanded to that court for further proceedings in accordance with this opinion.

Hugh J. Carroll and Lester T. Murphy, for complainants.
Quinn & Kernan, for respondent Ryder.

Edward C. Stiness and Frederick W. O'Connell, for respondent Watts.

CHARLES F. HECK vs. JOHN W. CASEY.

JULY 6, 1912.

PRESENT: Johnson, Parkhurst and Sweetland, JJ.

(1) *Mechanic's Liens. Entire Contract.*

A sub-contractor entered by parol into an entire contract with the general contractor. The work and delivery of materials was done within nine or ten days after July 25, and no further work was done until October. March 8, legal proceedings were commenced to enforce the lien.

Held, that this was not a compliance with Gen. Laws, 1909, cap. 257, § 5, and petition would be dismissed.

PETITION to enforce mechanic's lien. Heard on appeal of respondent and sustained.

PARKHURST, J. This is a proceeding by a subcontractor to establish a mechanic's lien for labor and materials, under the provisions of Gen. Laws, R. I. (1909), cap. 257. It appears from the petition as well as from the papers on file and from the evidence set forth in the transcript that the petitioner in July, 1910, entered into a parol contract with Michael J. Donahue, the general contractor, who was engaged in building a house for John W. Casey, on Manton Avenue, Providence, to put in the plumbing and gas-piping in said house on Manton Avenue for the sum of four hundred and twenty-five (425) dollars; this contract was a single and entire contract for plumbing and gas-piping, without any specification of items. The petitioner filed his plan in the office of the inspector of plumbing July 25, 1910, and immediately thereafter began work under the contract, delivering certain materials for gas-piping, waste pipes, soil pipes, drops and outlets for gas, etc., and doing all the work which had to be done before the house was plastered, which was to be covered up by the plaster; this delivery and work was done within nine or ten days after July 25, 1910; after

that no further work was done under the contract, as the petitioner claims, until October, 1910.

The petitioner not having received payment from the contractor for work done and materials furnished under said contract, and after giving notice to the said Casey, on March 8, 1911, filed an account or demand with a notice as to the building and land upon which he claimed a lien, in the office of the recorder of deeds of the city of Providence, the same being "for the purpose of commencing legal process for the enforcement of a lien," etc., as recited in the notice, under the provisions of Sec. 7 of cap. 257, above referred to, and thereafter on March 10, 1911, filed this petition. The respondent, Casey, thereafter on May 8, 1911, filed his motion to dismiss the petition, on the ground, among others set forth, that the court "has not acquired jurisdiction of the subject matter because the complainant has not complied with the statutory requirement," etc. The Superior Court denied the motion, and the same was renewed at the hearing of testimony and was again denied. The justice of the Superior Court, after hearing the evidence, decreed the establishment of a lien for \$305 and referred the case to a master; from this decree the respondent has appealed to this court, and the first reason of appeal is based upon the same ground as that in the motion to dismiss above referred to.

We are of the opinion that the justice of the Superior Court erred in denying the motion to dismiss the petition on the ground above set forth. It is not disputed that the contract was an entire contract for the work and materials in plumbing and gas-piping; it is so stated in all the papers and notices attached to the petition and filed in the office of the recorder of deeds; it is so proved in the evidence; and there is no dispute that the commencement of the work and of the delivery of materials, under this entire contract was in July, 1910; the commencement of legal proceedings for the establishment of the lien as provided in cap. 257, Sec. 7, was on the

(1) 8th day of March, 1911, more than seven months after the commencement of the work and of the delivery of materials.

This is not in accord with the provisions of Gen. Laws, R. I. (1909), cap. 257, § 5, which reads as follows: "Sec. 5. No person who shall do work for or furnish materials to be used in the construction, erection, or reparation of any building, canal, turnpike, railroad, or other improvement, without written contract, shall have any advantage of any lien therefor created by this chapter, unless he shall commence legal process for enforcing the same, in manner hereinafter provided, within six months from the time of the commencing the doing of such work or of the commencing the delivery of materials, if payment for the same shall not then be made."

The case is governed by the decision of this court in *McParlin v. Thompson*, 32 R. I. 291.

The appeal is sustained, the decree of the Superior Court is reversed, and the cause is remanded to the Superior Court, with direction to enter its decree dismissing the petition with costs.

William A. Morgan, for petitioner.

Gardner, Pirce & Thornley, for respondent.

Charles R. Haslam, of counsel.

CENTREVILLE NATIONAL BANK OF WARWICK *vs.* CHARLES M.
INMAN.

JULY 6, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Removing Default. Passing on Defence of Defendant.*

In the matter of motions to take off defaults, where the question whether the defendant has a defence on the merits is involved, the court will not seek to determine whether the defence claimed will prevail on a trial.

(2) *Removing Default. Passing on Defence of Defendant.*

Upon a motion to remove a default, it was error for the court to pass upon the truth and sufficiency of defendant's claim, which could only properly be passed upon by a jury or by the court in case jury trial was waived.

ASSUMPSIT. Heard on exception of defendant, and sustained.

PARKHURST, J. The defendant was defaulted in the Superior Court under the following circumstances; the suit was brought August 1, 1911, and made returnable August 15, 1911; the defendant employed an attorney who seasonably entered his appearance for defendant on August 9, 1911; and said attorney was, upon his request, duly excused from further attendance on the Superior Court from August 9 to September 15, 1911, and went away on a vacation and did not plead to the action within the time fixed by statute; while he was away, notice of motion by plaintiff's attorney to take judgment by default was left at his office, but not received by him, and default was taken September 2, 1911, before a justice other than the one who excused the attorney; upon the return of the defendant's attorney in September, he immediately moved to take off the default and a hearing was had before the Presiding Justice of the Superior Court, who heard evidence upon the question, whether the defendant had a defence to the action, as a condition precedent to taking off the default and allowing the defendant to plead to the action and proceed to trial.

From the transcript of the proceedings at this hearing, it does not appear that the question of the absence of the defendant's attorney on vacation and of his being excused by a justice of the court or that this was a valid excuse for not pleading to the action, was questioned; or that any question was considered, other than to find out whether the defendant had a defence to the action, it being conceded by the justice at the hearing that he would take off the default and allow the defendant to plead and go to the jury, if he could see any reasonable defence. But after hearing evidence from the defendant and also from the cashier of the plaintiff bank, the justice decided that there was no reasonable defence, and refused to take off the default. To this decision the defendant took exception and the case is now before this court upon this exception.

It appears that the note, upon which suit was brought, was originally for \$1,200, dated July 2, 1904, to the order of the plaintiff, payable six months after date. It bears upon its face the signature of Daniel E. Sullivan and D. Lehane, and also the name "Charles M. Inman;" but Mr. Inman says he never saw the note until June 30, 1906, when he admits that he signed his name on the back of the note, under the words "June 30, 1906, I hereby guarantee the payment of this note." He denies that he ever saw the note before this latter date; but he is not certain whether he did or not place his name on the face of the note at this time. The cashier testified that he saw Mr. Inman sign the note in both places, but he does not give the date at which he claims it was signed on its face, nor does he offer any explanation why the defendant, if he was a joint and several maker, should have signed a guaranty on the back of the note, or why, if he was a guarantor, he should have signed on the face of the note, as a joint and several maker. We think the note itself indicates that the signature of Charles M. Inman was placed thereon in different ink and probably at a different time from the other signatures; and it appears that the claim of Mr. Inman is that he had nothing to do with the note when it was given, and knew nothing of it till nearly two years after its date, when he admits that he guaranteed it. The declaration simply declares against Mr. Inman as a maker of the note and so as primarily liable, but contains no count against him as a guarantor.

Under the circumstances, we think that the defendant should have been permitted to go before a jury and make his defence on the question whether or not he was a maker of the note, he being sued only as maker and not as a guarantor.

- (1) In the matter of motions to take off defaults, where the question whether the defendant has a defence on the merits is involved, it has been frequently held, that the court hearing the motion will not seek to determine whether the defence claimed will prevail on a trial; *Excise Commrs. v. Hollister*, 2 *Hill*. (N. Y.) 588; *Benedict v. Arnoux*, 85 *Hun*. (N. Y.) 283;

nor will the court, on the motion, hear counter affidavits on the merits or examine into the truth of the allegations of defence—6 Encyc. Pl. & Pr. 188 and cas. cit.; *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Buck v. Havens*, 40 Ind. 221, 224; *Hanford v. McNair*, 2 Wend. (N. Y.) 286.

- (2) The error of the court in the case at bar was in passing upon the truth and sufficiency of the defendant's claim that he was not a maker of the note, which could only properly be passed upon by a jury on the trial of the case, or by the court in case a jury trial was waived.

The defendant's exception is sustained, and the case is remitted to the Superior Court, with direction to enter its order taking off the default upon such terms as to costs, as it shall determine, and to permit the defendant to plead within such time as it shall fix, and for further proceedings.

Archibald C. Matteson, for plaintiff.

John P. Beagan, Joseph J. McCaffrey, for defendant.

RHODE ISLAND HOSPITAL TRUST CO., Trustee, vs. HENRY DUNNELL *et al.*

JUNE 29, 1912.

PRESENT: Johnson, Parkhurst, and Sweetland, JJ.

(1) *Trusts. Powers. Wills.*

A fund was left to a trustee to pay over the income to X. for her life and upon her death to stand seized "to such uses and in such manner and for such persons as such deceased shall by her last will declare and appoint concerning the same; and in default of such will then in trust for such persons as shall be the then heirs at law of such deceased, of my blood according to the statutes of descent then in force in said State of Rhode Island, such persons to take in the proportions prescribed by the same statutes."

X. deceased leaving a will containing no reference to the power of appointment or to the fund, but containing a residuary clause bequeathing "all the rest, residue and remainder of my estate and property of which I may die seized or possessed or to which I may be entitled, whether real or personal:"—

Held, that, under Gen. Laws, 1896, cap. 203, § 9 (now Gen. Laws, 1909, cap. 254, § 9), "a bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be con-

strued to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will," the bequest included the personal estate over which she had the power of appointment, and operated as an execution of the power.

(2) *Statutes. Following Foreign Construction.*

Where a foreign statute has received a definite construction prior to its adoption in this State, the construction given to it in the jurisdiction of its origin will also be adopted when the statute itself is copied.

(3) *Conflict of Laws. Wills. Powers.*

While the law of the domicile of the donor controls as to the execution of the power by the donee, the fact that the will giving the power was made and took effect before a change in the statutes, is immaterial, for where the will of the donor did not specify that the power should be executed only by a special form of will, the legislature can determine the construction of a later will and give it the effect of executing a previously granted power.

BILL IN EQUITY for instructions. Certified under Gen. Laws, 1909, cap. 289, § 35.

JOHNSON, J. This is a bill in equity for instructions brought by the Rhode Island Hospital Trust Company as trustee under the will of Jacob Dunnell, late of Pawtucket, deceased, certified to this court under Gen. Laws, 1909, cap. 289, § 35.

By the will of said Jacob Dunnell, who died in May, 1886, one-fourth of certain personalty was bequeathed to the complainant in trust to pay the net income to Sophie B. Denny, a daughter of the testator, during her lifetime and upon her decease to stand seized of the fund "to such uses and in such manner and for such persons as such deceased shall by her last will and testament declare and appoint concerning the same; and in default of such will then in trust for such persons as shall be the then heirs-at-law of such deceased, of my blood according to the statutes of descent then in force in said State of Rhode Island, such persons to take in the proportions prescribed by the same statutes."

Sophie B. D. Denny died in May, 1910, a resident of New York city, leaving a will containing no reference to

said power of appointment or to the fund in the possession of the complainant, but containing the following residuary clauses:

"FIFTH. I give, devise and bequeath to my said husband, John T. Denny, one-half of all the rest, residue and remainder of my estate and property, of which I may die seized or possessed, or to which I may be entitled, whether real or personal.

"SIXTH. I give, devise and bequeath the other half of such rest, residue and remainder as follows:—One-third to my son Thomas Denny, one-third to my daughter Maude D. Denny, and the remaining third as follows:—to wit:—one-half thereof to my son, Thomas Denny, to be used as he may think for the best interests of such of his children as may survive me, but without imposing any trust in respect thereto, and the other half thereof to my grandson, Francis C. Dale, if he shall survive me; but if he shall die before me, then such portion shall fall into and be distributed as a part of my residuary estate as hereinbefore provided."

The question presented is whether these residuary clauses of the will of Sophia B. D. Denny operated to exercise the power of appointment given her by the will of Jacob Dunnell. The further question has been argued whether, if the power was not exercised, the trust fund held by the complainant now belongs exclusively to the children and issue of Mrs. Denny or to all the heirs of Jacob Dunnell.

From the decisions of this court it is clear that under the law of this State as it stood prior to the passage of cap. 203, Sec. 9, Gen. Laws, R. I. 1896, the will of Mrs. Denny would not have exercised the power of appointment given her by said will of Jacob Dunnell. *Matteson v. Goddard*, 17 R. I. 299; *Cotting v. De Sartiges*, 17 R. I. 668; *Mason v. Wheeler*, 19 R. I. 21.

Thus in *Mason v. Wheeler*, 19 R. I. 21, at page 22, MATTESON, C. J., says: "The rule in relation to the execution of powers, as stated by Mr. Justice Storey, in *Blagge v. Miles*, 1 Story, 446, which may be regarded as a leading case in this

country on the subject, is that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deemed an execution of the power. It is not necessary, however, that the intention to execute should appear by express terms or recitals in the instrument; it is sufficient if it appears by words, acts or deeds demonstrating the intention. In the case referred to three classes of cases are enumerated which have been held to be sufficient demonstrations of an intended execution of a power; 1, where there has been some reference in the will or other instrument to the power; 2, a reference to the property which is the subject on which the power is to be executed; 3, where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity; in other words, would have no operation except as an execution of the power."

In the case at bar it is admitted that there was other property of Mrs. Denny which passed by the residuary clauses and that a general residue was bequeathed by said residuary clauses without description of property and containing no reference to the power.

Cap. 203, § 9, Gen. Laws, 1896, reads as follows:

- (1) "Sec. 9. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise, described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will; and in like manner a

bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." This section is a literal copy of Sec. 27 of the English Wills Act, 1 Vict. c. 26, and has remained in the statutes unchanged, being now Section 9, cap. 254, Gen. Laws, 1909.

The decisions of this court cited *supra* were in accord with the decisions of the English Courts made prior to the passage of the Wills Act. Denn. Dem. *Nowell v. Roake*, 6 Bing. 475, 478; *Andrews v. Emmot*, 2 Bro. 297; *Jones v. Curry*, 1 Swanst. 66.

In the first of these cases, Alexander C. B., giving the unanimous opinion of the judges to the House of Lords, says: "There are many cases upon this subject, and there is hardly any subject upon which the principle appears to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir Edward Clere's case, in the reign of Queen Elizabeth, to be found in the sixth report, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provisions made by the person entrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority."

It seems to have been uniformly held that the English law upon the subject was changed by the section of the Wills Act above cited and that a general residuary clause of either real or personal property will now execute the power, although such clause contains no reference to the power and although the extrinsic facts before regarded as necessary are entirely absent. *Spooners Trust*. 2 Sim. N. S. 129 (1851);

(2) *Hutchins v. Osborne*, 4 K. & J. 252; *Thomas v. Jones*, 2 J. & Hem. 475; *Scriven v. Sandom*, 2 J. & Hem. 743 (1862); *In re Powell's Trusts*, 39 L. J. Ch. 188; *Boyes v. Cook*, L. R. 14 Ch. Div. 53; *In re Clarke's Estate*, L. R. 14 Ch. Div. 422; *Freme v. Clement*, L. R. 18 Ch. Div. 499; *Holyland v. Lewin*, L. R. 26 Ch. Div. 266. See, also, *Wilday v. Barnett*, L. R. 6 Eq. 193.

The English Statute had thus received a definite construction long prior to its adoption in this State, and it is a general rule that where a foreign statute has been so construed, the construction given to it in the jurisdiction of its origin will also be adopted when the statute itself is copied.

Thus DUFFEE, C. J., in *Sayles v. Bates*, 15 R. I. 342, at 344, citing Massachusetts decisions upon the statute there under consideration said: "Our statute was borrowed from the Massachusetts statute, and should be construed the same way, unless there is some strong reason for construing it differently." STINESS, J., in *Miller v. Coffin*, 19 R. I. 164, 168; "When a statute is adopted which has already received a judicial construction, it is to be presumed that it was adopted in view of such construction." See, also, *In Re O'Connor*, 21 R. I. 465.

But if the Wills Act had not been construed by the English cases, it would still be evident that the law has been changed by the statute. Before the enactment of the statute in question, the rule was "that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deemed an execution of the power." *Mason v. Wheeler*, *supra*. By the statute, however, "a bequest of the personal estate of the testator or any bequest of personal property described in a general

manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The language of the bequest in Mrs. Denny's will being "all the rest, residue, and remainder of my estate and property, of which I may die seized and possessed, or to which I may be entitled, whether real or personal," such bequest will include any personal estate which she may have power to appoint in any manner she may think proper, and will operate as an execution of such power, unless a contrary intention shall appear by the will. If this is not so the statute is without effect.

In several of the cases cited, *supra* considerable stress was laid upon the final words of the statute, "unless a contrary intention appear by the will." Thus Cotton, L. J., in *Boyes v. Cook*, at page 57, "in my opinion that section applies unless a contrary intention appears by the will, whether the will is made before or after the creation of the power. We have to look only at the will for a contrary intention, and the distinctions made by the settlement cannot be said to be a contrary intention appearing by the will." Wood, V. C., in *Scriven v. Sandom*: "There is no contrary intention within the meaning of the Statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power. It would not be a safe rule to proceed upon, to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power; there ought to be shown something which can fairly be described as inconsistent with such an intention. The cases upon dower have some bearing on the point, where it is always held that the dower attaches in the absence of some positive inconsistency between the gifts contained in the will and the claim of dower. Other analogies of the same kind may be suggested, and they all tend to the conclusion that the only

safe rule for discriminating between mere conjecture and the contrary intent required by the statute is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power."

The statute of New York, Laws of 1897, Vol. 1 Ch. 417, is in somewhat different terms from our statute and is as follows: "Sec. 6. Power To Bequeath Executed By General Provisions In Will. Personal property embraced in a power to bequeath, passes by a will purporting to pass all the personal property of the testator; unless the intent, that the will shall not operate as an execution of the power, appears therein either expressly or by necessary implication."

The substance of this statute is the same as that of the English and Rhode Island statutes. And long before the enactment of this statute expressly extending the principle to personal property, the statute applying in terms to real property had been extended to personal property by the decisions of the New York Court. *N. Y. Life Ins. Co. v. Livingston*, 133 N. Y. 125; *Lockwood v. Mildeberger*, 159 N. Y. 181.

In the latter case, the court, Parker, Ch. J., at p. 185, says: "It was the rule of the common law that whether a particular disposition should be treated as an execution of a power was a question of intention, and that the several provisions of a will should be carefully considered for the purpose of ascertaining whether the party really meant to execute the power or not. (4 Kent's Com. 335; *White v. Hicks*, 33 N. Y. 393.) The common law rule, however, has been changed by legislative enactment. By Section 126 of the Statute of Powers, now Section 156 of the Real Property Law (L. 1896, ch. 547), it is provided that 'lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall

appear, expressly or by necessary implication.' (1 R. S. 737.)

"It was held by this court in *Hutton v. Benkard* (92 N. Y. 295), that the rule laid down in Section 126 (*supra*), touching the execution by will of a power as to real estate, should be applied to personal estate also, and it follows, therefore, that it is the law of this state that by the residuary clause, by which Mrs. Mildeberger gave to her husband all the rest, residue and remainder of her estate, she executed the power of appointment given to her by her grandmother's will, unless it appears expressly, or by necessary implication from the language of the will, that it was not her intent that the will should operate as an execution of the power. It is not pretended that she expressed an intent that the residuary clause should not operate as an execution of the power, nor do we think that it appears by necessary implication. Such an intent is not to be implied from the fact that no reference was made to her grandmother's will, or to the power of appointment therein conferred upon her, for the disposition of all her own property operated under the will as an exercise of such power of appointment. The omission of all reference to it, therefore, does not imply an intent not to execute the power. The basis for a necessary implication that it was not her intent to execute the power must, therefore, be found in some other provision than that which under the will operates as an execution of the power. In examining the will in the light of the grandmother's will, and the circumstances surrounding Mrs. Mildeberger at the time of the execution of her will, it will not suffice to indulge in assumptions, for the law requires that the intent not to execute the power must appear either expressly or by necessary implication. Necessary implication results only where the will permits of no other interpretation. Necessary is defined to mean: 'Such as must be;' 'Impossible to be otherwise;' 'Not to be avoided;' 'Inevitable.' The intent not to execute the power, therefore, must not be implied unless it so clearly appears that it is not to be avoided."

Counsel for Henry Dunnell *et al* contend that Section 9 of Chapter 254 of the General Laws of 1909, has no application, and argue as follows: "The Dunnell will having been executed in 1883, and the testator having died in 1886, and the Denny will having been executed in 1908, and the testatrix having died in 1910, we have a case where the law in force at the *time* of the execution of the will of the donee of the power differs from the law in force at the time of the execution of the will of the donor.

- (3) "Where the law in force at the *place* where the donor has his domicile differs from the law in force at the place where the donee has his domicile, the law of the domicile of the donor controls as to the execution or non-execution of the power. *Lane v. Lane*, 4 Pennew. (Del.) 368; *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. St. 345; *Lawrence's Estate*, 136 Pa. St. 354, 363; *Cotting v. De Sartiges*, 17 R. I. 668.

"In *Sewall v. Wilmer* the court says at pages 136 and 137: 'It is true that, as to personal property at least, the construction and effect of a will, and the distribution thereby made of the testator's estate, are to be governed by the law of his domicile. But the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father. The domicile of the testator whose property is in question is therefore the domicile of her father. . . . She must be presumed to have intended that her will should have the effect, by way of appointment, attributed to it by the law of the only place in which it could be made operative as such.'

"In *Bingham's Appeal* the court says: 'It is manifest that no possible judicial interpretation of the words 'my personal estate' can make them mean the estate of another. It is simply a legal effect or operation of the law of statutory construction which can do so. But where the situs both of the will containing the power, and of the property subject

to it lies beyond the domain of Parliament, it is evident that the statutory construction of the instrument of execution can have no operation upon it. That would be to subject Pennsylvania rights to English dominion. Whether a power contained in a Pennsylvania will over Pennsylvania property has been duly executed, is evidently a question of Pennsylvania law, and not that of a foreign country having no jurisdiction.'

"In *Cotting v. DeSartiges* our own court says: 'It is not the fact of the donor's ownership of the property which points to the law of this State as the criterion, but the fact that her will is the controlling instrument in the disposition of the property.'

"Similarly the legality of the disposition made by the donee is governed, not by the law of his domicile, but by the law of the domicile of the donor of the power. *In re Bald*, 66 L. J. Ch. N. S. 524; *Pouey v. Hordern* (1900) 1 Ch. 492; *In re Megret* (1901) 1 Ch. 547.

"In *Pouey v. Hordern* the court says at page 494: 'The execution of such a power does not bring the appointed property into the will of the appointee at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment.'

"Even in the matter of determining whether the instrument executed by the donee is or is not a will, it is held that the instrument must be executed according to the formalities required by the law of the domicile of the donor. *Blount vs. Walker*, 28 S. C. 545; *In re Kirwan's Trusts* 25 Ch. Div. 373; *Hummel vs. Hummel* (1898) 1 Ch. 642; *In re D'Este* (1903) 1 Ch. 898; *Barretto vs. Young* (1900) 2 Ch. 339; *In re Scholefield* (1905) 2 Ch. 408.

"All of the above cases are concerned with a difference in the place of the execution of the donor's will and the donee's, rather than with a difference in time. But the principle of all the cases (and it is nowhere more distinctly stated than in the Rhode Island case) is that since the will

of the donor is the controlling instrument the law *applicable to the will of the donor* governs in determining whether the will of the donee executes the power. The Dunnell will controls the Denny will and therefore the law governing the Dunnell will governs the Denny will. If this be the true principle it applies equally well to a difference in time as to a difference in place, *with this distinction, that if the law applicable to the donor's will has been changed before the will of the donee goes into effect it is the later law which will prevail. It appears to be the contention of the Denny family that this is exactly what has occurred here by the enactment of Section 9 of Chapter 254 of the Laws of 1909, passed originally in 1896.*"

The italics are ours. Counsel proceeds: "The complete answer to this contention is that Section 45 of the same Chapter provides that 'this chapter and the provisions thereof shall not extend to any will made and executed prior to the first day of February, eighteen hundred ninety-six, . . . but the law in force at the time of the execution of such will made and executed prior to said date, shall govern the same.' It is no doubt competent for the legislature to pass an act affecting wills already made (*Langley vs. Langley*, 18 R. I. 618), and even affecting wills that have gone into effect (*Smith vs. Hall*, 20 R. I. 170), but it is expressly declared that Section 9 of Chapter 254 shall not have that effect."

The cases cited by counsel in the above argument as to the controlling power of the law of the domicile of the donor are in point. It is well settled that the law of the domicile of the donor controls as to the execution of the power by the donee. That the law of the domicile of the donor at the *time* of the execution of his will is to control as to the execution of a power of appointment given by said will, to the exclusion of the law of said domicile at the time of the execution of the power is an entirely different proposition.

There would seem to be no doubt upon principle that the fact that Mr. Dunnell's will giving the power was made and took effect before the statute can make no difference. The

statute deals not with the creation of the power, but with its execution.. Mr. Dunnell's will did not specify that the power should be executed only by a special form of will, but by will generally and the legislature can determine the construction of a later will and give it the effect of executing a previously granted power. Section 34 of the Wills Act provides "that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight." This provision did not prevent the English courts from holding that powers created prior to the Wills Act could be executed according to its provisions. In the following cases the instrument granting the power preceded the statute by which the later will was construed. *Hutchins v. Osborne*, 4 K. & J. 252, *Turner v. Turner*, 21 L. J. Ch. 843, *Freme v. Clement*, L. R. 18 Ch. Div. 499.

Counsel also contend that the bequest is not within the terms of the statute, and argue that: "Even if Section 9 of Chapter 254 were applicable to the Denny will it is submitted that the words of the will do not bring it within the terms of the statute. The power is executed only by a bequest 'of the personal estate of the testator' or of property 'described in a general manner.' It is evident that there is no property here 'described in a general manner.' To refer to property as the residue 'of my estate and property, of which I may die possessed, or to which I may be entitled' may serve to identify it, but the words are not descriptive; and if those words were to be regarded as a description they constitute a misdescription when applied to property over which the testatrix has only a power of appointment. As is later pointed out, she was not 'possessed of' or 'entitled to' the fund held by the complainant as trustee.

"But it is the phrase referring to bequests 'of the personal estate of the testator' that is the dangerous one. The statute is written in the third person and wills are, perhaps invariably, written in the first person. In translating the statutory words 'the personal estate of the testator' into a will they necessarily become 'my personal estate;' and it is

very generally and properly held in England that a bequest of 'my property' or of 'all my property' or 'residue of my property' executes a power by virtue of the statute. But in the present case the testatrix's intentions were not described when she bequeathed the residue 'of my estate and property,' which, so far, would unquestionably, under the statute, execute a power; she went on and specified that it was her estate and property 'of which I may die possessed or to which I may be entitled.' She certainly was not possessed of this fund nor could she be entitled to any part of it except unpaid income and a proportionate part of income accrued, but not yet payable. (Gen. Laws, C. 254, § 39). The statute does not alter the meaning of the words 'possessed of' or 'entitled to' and they are just as inapplicable now as ever to property over which one has a power of disposition only. *Matteson vs. Goddard*, 17 R. I. 299, 302."

The argument does not avail to make the bequest anything but a bequest of the residue of the property of the testatrix, and by the statute such a bequest operates as an execution of the power.

In the will of Mrs. Denny the bequest is of "all the rest, residue and remainder of my estate and property, of which I may die seized or possessed or to which I may be entitled, whether real or personal." In the case cited, *Matteson v. Goddard*, the court said: "When Mr. Goddard made his will, he evidently wished to give his wife the entire residue of his estate as it should exist at his death, and for that purpose beyond question, added the words 'of which I may be possessed *at the time of my death*,' after the words, 'all the rest and residue of my property, real, personal, and mixed, wherever situated and of whatever kind.'

"The words 'or over which I *at the time of my death* may have the power of testamentary disposition' follow the words 'of which I may be possessed at the time of my death,' referring back to the same antecedent, and may be naturally read as a supplemental or completer expression of the same purpose. In each phrase the time to which it relates is a

prominent feature. It may be that the later phrase is unnecessary for such a purpose; and yet a man may *own* more than he *possesses*, if 'possess' is used in its primary signification, and hence the words 'or be then entitled to' are often added for greater surety; instead of which, in the residuary clause here, the phrase in question may be well regarded as having been used."

The bequest is clearly within the terms of the statute. No intent not to execute the power can be gathered from Mrs. Denny's will. By the first two clauses she disposes of specific property consisting of real estate in New York city and certain of the contents of her homestead. By the third and fourth clauses she disposes of other specific tangible property presumably also situated in New York city. It is only by the fifth and sixth clauses that she undertakes to dispose of any other property and she does so by general residuary bequests.

There remain therefore only these residuary clauses from which such intent is to be gathered. Certainly no intention not to exercise the power of appointment given her by her father's will appears from these clauses.

Our decision is that the will of Sophie B. D. Denny operated to execute the power given to her by the will of Jacob Dunnell. It is therefore unnecessary to consider the question argued as to the ownership of the fund in the event that the power was not exercised.

A decree may be presented in accordance with this opinion, in order that the same may be approved by this court and ordered entered in the Superior Court.

James Tillinghast, for complainant.

Livingston Ham, for Henry Dunnell, *et al.*

Tillinghast & Collins, for the Dennys.

Coudert Brothers, of counsel.

JOHN W. DODGE vs. BRIDGET LAVIN *et al.*

BRIDGET LAVIN vs. JOHN W. DODGE.

JOSEPH H. MARKS, *et al.*, vs. JOHN W. DODGE.

JULY 6, 1912.

PRESENT: Johnson, Parkhurst and Sweetland, JJ.

(1) *Deeds. Description.*

In construing the description in a deed, the grant of certain privileges over a strip of land is inconsistent with the grant of a fee therein.

(2) *Adverse Possession.*

Claimant and her ancestors in title for a period exceeding the statutory requirement had exercised dominion over the land in controversy, which was a lot extending to the water; had from time to time filled in the shore front and cultivated the grass:—

Held, that such acts were from their nature and extent sufficiently obvious to operate as a notice to others claiming an interest in the land and were as continuous as the care and character of the land demanded.

BILLS IN EQUITY. Heard together on bills, answers and proof, and certified under Gen. Laws, 1909, cap. 289, § 35.

VINCENT, J. These are three suits in equity. The first is brought by John W. Dodge against Bridget Lavin and others and prays for the partition of a certain strip of land lying in the town of Barrington. The second is brought by Bridget Lavin and prays that certain deeds from the heirs of William H. Allin to Dodge may be declared void, either wholly or in part. The third prays that certain deeds made to Bridget Lavin may be declared valid.

All of these deeds relate to the strip of land which is the subject of the first named or partition suit and is shown in red on the accompanying survey.

These cases were, by agreement, heard together in the Superior Court upon bill, answer and proofs and were upon consideration of the same certified to this court for determination under Chap. 289, Sec. 35, Gen. Laws of 1909.

Dodge alleges in his bill that one William H. Allin, at the time of his decease in 1894, was sole owner in fee simple of the strip of land referred to; that he died intestate leaving no children or direct descendants and that the title descended to collateral heirs. That afterwards some of these collateral heirs conveyed their interests to him, some to the respondent, Bridget Lavin, while others have made no conveyance. The title of the property is now vested as follows: John W. Dodge 101-108; Bridget Lavin 4-108; Nellie Frey 1-108; Grace I. Schiele 1-108, and Harry S. Kinnicutt 1-108. Dodge further alleges that said estate is a narrow strip of shore land, with certain riparian rights connected therewith; that it cannot be divided by metes and bounds so as to give to each of the co-owners their respective interests and he prays that such partition may be effected through a sale, &c.

Bridget Lavin alleges, in her bill, that the deed of August 22, 1857, from Thomas R. Allin and William H. Allin to Patrick Martin and Margaret Martin included the strip of land in question, and that upon the decease of her father and mother, the said Patrick and Margaret Martin, she inherited the same and has since been in continuous possession thereof. She also sets up a title by adverse possession.

She further alleges that after the decease of William H. Allin, Howard E. Allin, as administrator upon his estate, was authorized by a decree of the Probate Court of the town of Barrington,—on September 10, 1904,—to sell the interest of William H. Allin in a tract of land lying inland, to the east of her said land and still further away from Bullock's Cove, and he accordingly advertised that he would sell at auction on August 2, 1898, the interest of William H. Allin in a parcel of land, with an oyster house and wharf, without claiming any right to sell, or indicating any intention of selling, the strip of land which was a projection of the Lavin land to the west; that at said auction sale Dodge purchased the southerly part of the parcel advertised, with an oyster house standing thereon, and a wharf extending therefrom into the Cove, and received a deed from the administrator, September 21, 1898,

but that no part of the shore, at the five rod projection of the Lavin land, entered into such purchase; that later by authority of the same decree he conveyed to Dodge by deed of April 10, 1899, a parcel of land next north of the former purchase, pursuant to an auction said to have been held April 4, 1899; that upon the second parcel of land Dodge erected valuable improvements; that said sales to Dodge were void because (1) the Probate Court had not authorized the sale of said property and (2) under General Laws, 1896, cap. 213, the authority given to said administrator had expired; that neither the complainant, Bridget Lavin, nor the administrator or heirs of William H. Allin disputed the right or title of Dodge to that portion of the property advertised by said administrator or which the deeds to Dodge purport to convey, or to the shore in front thereof.

Bridget Lavin further alleges that following the auction of August 2, 1898, Dodge, by filling, changed the wharf from a narrow plank structure to one of wide, solid construction; that in 1906 the said complainant, Lavin, first heard that Dodge claimed her shore at the said five rod projection; that Dodge having learned that his title to what the deeds purported to convey to him was defective proceeded to procure a deed from certain heirs of William H. Allin, with the professed intention of perfecting such title, but that the description, in said last named deed, was drawn to include not only the property purchased by Dodge at the auctions of August 2, 1898, and April 4, 1899, but also the shore, at said five rod projection of the Lavin land, which was not included in the previous deeds to Dodge.

The complainant Lavin also sets forth in her bill, by way of averment upon information and belief, that the aforesaid deed from the Allin heirs was procured by misrepresentation and the withholding of facts; that the said heirs upon learning that they had executed the deed to Dodge through deception, executed and delivered, to the complainant Lavin, deeds releasing to her all of their interest in the strip of land in question.

The complainant Lavin disclaims any desire to disturb the title of Dodge to the oyster house lot, fronting ten rods on Bullock's Cove by five rods deep, with the oyster house and wharf as described in the deed from Howard E. Allin, administrator, to Dodge, or the dwelling house described in the later deed, but she prays that such deeds may be annulled in so far as they purport to cover the strip of land in question and to convey therein the interests of heirs of William H. Allin.

Joseph H. Marks in his bill in which Bridget Lavin is also a party complainant alleges that the deed of August 22, 1857, from Thomas R. Allin and William H. Allin to Patrick Martin and Margaret Martin conveyed a tract of land situated in Barrington; that the southerly five rods of the west end of said tract extended five rods further west than the balance of the west end of said tract, and he avers, upon information and belief, that the five rod projection extended to mean high water mark of Bullock's Cove; that Patrick and Margaret Martin in their lifetime and Bridget Lavin, since their decease, have continuously been in possession of said tract to the present time.

The Marks' bill further sets up title by adverse possession in Bridget Lavin; the appointment of Howard E. Allin as administrator of the estate of William H. Allin; the two auction sales and deeds from Howard E. Allin, as administrator, to Dodge; that such sales were unauthorized and void; that neither Marks, Bridget Lavin nor the administrator or heirs of William H. Allin ever disputed the right or title of Dodge to the portion of the property which was advertised and covered by the deeds made in pursuance of the two auction sales.

Further allegations in the Marks' bill set forth the changes made by Dodge in the wharf; the receipt of information by Bridget Lavin in 1906, that Dodge claimed the shore at the five rod projection of her land; and that in 1908, Dodge had apparently learned for the first time that the two convey-

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ances from Howard E. Allin, administrator, did not carry a valid title.

The Marks' bill in continuation sets forth the conveyance of Marks' interest in the strip of land in question to Dodge; the method and manner in which the execution of such deed was procured; that is, under cover of correcting the title of Dodge in the property purchased at the auction sales from the administrator of William H. Allin; the making of a deed subsequently—January 7, 1910—from Marks to Lavin conveying his interest in the latter's property; that at the time of giving said last named deed, the complainant, Marks, first learned that his prior deed to Dodge purported to cover the five rod projection of the Lavin land, and that the complainants Marks and Lavin do not seek to disturb Dodge in the enjoyment of the property covered by his deeds from Allin's administrator and acquired through the auction sales before mentioned.

The bill prays for the annulment of the deed from Marks to Dodge, so far as the same relates to the land lying between Bullock's Cove and the westerly five rod line of the said Lavin land.

The three chief questions presented for consideration by these several bills are: First, has Bridget Lavin any title to the strip of land in question, being the extension of her five rod line as indicated in red on the accompanying survey, under the deed from Thomas R. and William H. Allin to Patrick and Margaret Martin of August 22, 1857? Second, has Bridget Lavin a title by adverse possession in said strip of land? Third, should the deeds from the heirs of William H. Allin to Dodge be annulled so far as the same purport to include the strip of land in question?

The deed of August 22, 1857, from Thomas R. and William H. Allin to Patrick and Margaret Martin conveys a parcel of land lying next north of the Bicknell, later the Higgins, land. The description in this deed is as follows: "A certain piece or parcel of land situated in Barrington and bounded as follows, viz.: Beginning at the Southeast corner of the Lot

called the Point Lot, and running North 74 degrees West, Twenty-seven rods and one foot, thence N. 15° East five rods, thence South 74° East five rods, thence N. 15° East, ten rods and twelve and one-half links, thence South 74° East twenty-two rods and one foot, thence South 15° West on the line of a 'Juniper hedge' to the first mentioned corner, being bounded on the South by land of Elizabeth W. Bicknell, and on the East, North and West by land of the aforesaid Thomas R. and William H. Allin, containing two acres and forty seven rods more or less. With the privileges of landing, loading and unloading, his boat, from the west side of the first mentioned five rods, and also of passing to and from said land by the road or path leading to the shore on the Easterly side of the aforesaid land."

- From an examination of the survey in connection with the above description we find that the lines are definite, easily followed and exclude the strip of land in red which is the westerly extension of the Lavin property or, in other words, the westerly extension of the five rod line. There is nothing
- (1) in such deed from which it can be reasonably inferred that it was the intention of the grantors to extend the grant westerly beyond the five rod line, and this conclusion is confirmed by the description itself which includes a grant of certain privileges over and upon this strip of land which would have been entirely unnecessary, as well as inconsistent, with the grant of a fee therein. We think, therefore, that Bridget Lavin acquired no title to the strip of land in question under the deed from the Allins to her father and mother, Patrick and Margaret Martin.

On the other hand it is equally clear that Dodge through the auction sales, and deeds given in pursuance thereof, by Howard E. Allin, as administrator on the estate of William H. Allin, acquired no title in said land for the reason that neither the advertisement of sale nor the description in such deeds, include any part of said strip or contain any language suggestive of such intention.

We now come to the question of title by adverse possession on the part of Bridget Lavin and her predecessors.

“Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it. . . . It is ordinarily sufficient if the acts of ownership are of such a nature as a party would exercise over his own property. . . . Actuality of possession is a question compounded of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant’s title, the character of the land, and the purpose for which it is adapted and for which it has been used. The only rule of general applicability is that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of, and must be exercised with sufficient continuity to acquaint the owner, should he visit the land, with the fact that a claim of ownership adverse to his title is being asserted.” See 1 Cyc. of Law & Proc., pp. 983–985, and cases cited.

- (2) Upon this question of adverse possession a decided preponderance of the evidence seems to sustain the claim of Bridget Lavin in that regard. There is ample testimony that the Martins and Bridget Lavin for a long period of years, more than the statutory requirement, exercised dominion over the strip of land in question, and that from time to time they filled in the shore front and cultivated the grass outside of the five rod line. These acts from their nature and extent were sufficiently obvious to operate as a notice to others who might claim an interest in said strip of land and were as continuous as the care and character of the land in question demanded.

We think that the title to the strip of land, as indicated in red on the survey, together with all riparian and other rights pertaining thereto is in the said Bridget Lavin by adverse possession, and that she is entitled to have annulled, so far as the same may relate to the land and rights in question, the beforementioned deeds from Marks and the heirs of William H. Allin to Dodge.

This conclusion renders the consideration of any other questions unnecessary.

The parties may present a form of decree to this court in accordance with this opinion.

Tillinghast & Collins, for John W. Dodge.

James C. Collins, of counsel.

Doran & Flanagan, for Bridget Lavin.

ALBERT F. EASTMAN vs. WILLIAM J. DUNN *et al.*

JULY 6, 1912.

PRESENT: Johnson, Parkhurst and Sweetland, JJ.

(1) *Pleading. Assumpsit. Election of Counts.*

Upon a declaration containing two counts in special assumpsit for breach of an express contract and two counts in indebitatus assumpsit, for the value of an option and for work and labor, the court did not err in refusing to order plaintiff to elect between the two sets of counts.

(2) *Pleading. Assumpsit. Verdicts.*

Where on a declaration containing counts for breach of an express contract and counts in indebitatus assumpsit, the jury found by a special finding that there was an express contract, it is to be inferred that a general verdict was based upon the breach of such an express contract.

(3) *Contracts.*

Where plaintiff under an agreement with defendant turned over to him an option whereby defendant received a valuable lease and in accordance with the agreement, looking to an ultimate partnership interest, devoted his time and services at defendant's request in an endeavor to carry out the agreement, upon the repudiation of the agreement by defendant, plaintiff may recover in assumpsit both the value of the option and of his services.

In such action, where the value of the option and of the lease obtained thereunder was shown by expert testimony to have been upwards of \$23,000 at the time when it was procured, a verdict for \$18,000 will not be disturbed.

Rule of damages, where breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, fully stated.

(4) *Contracts. Agency.*

Where plaintiff entered into a contract with defendants who were joint lessees of certain property, defendants must be deemed to be agents each for the other in matters relating to their common interests.

(5) *Pleading. Counts. Special Findings.*

Where upon a declaration in several counts, defendant had the opportunity to submit issues to the jury under each count, but refused, it cannot thereafter complain of a general verdict which the court finds to be conservative under the evidence.

(6) *Contracts. Option.*

Unless a contract or option provides for acceptance in writing, an oral acceptance is sufficient or it may be proved by the acts of the parties.

(7) *Contracts. Option. Charge of Court.*

Charge of court that if the jury found for plaintiff he would be entitled as damages to the fair market value of a lease at the time he turned it over to the defendant, was not prejudicial, where plaintiff had accepted an option whereby he might have taken the lease in his own name and assigned it to defendant, but to avoid this circuitry permitted it to be made direct to defendant.

(8) *Contracts. Charge of Court. Gift.*

Charge of court that if plaintiff had an accepted option that was of value, as defendant claimed it was a gift to him, the burden was upon defendant, to establish that position and to satisfy the jury by a fair preponderance of the evidence that it was a gift, was proper.

(9) *Evidence.*

In an action for breach of contract, between plaintiff and defendants, where defendants were joint lessees of certain property and had joint interests analogous to that of partners, plaintiff was properly permitted to introduce evidence for what it was worth, of things done by him at request of one defendant at a time when latter had told plaintiff that he and the other defendant were having nothing to do with each other, as plaintiff did not know the breach was irreconcilable and the evidence tended to show the relations of the parties and that plaintiff was acting in good faith in an endeavor to carry out the agreement, since each defendant was the agent of the other in matters of their common interest.

(10) *Manufactured Evidence. Secondary Evidence. Proving Notice of Claim by Parol.*

A duplicate carbon copy of a letter sent by plaintiff to defendant by registered mail, which was a mere notice intended to ascertain whether defendant would carry out his agreement with plaintiff without stating what such agreement was, is not open to the objection of being manufactured evidence, and also comes under the exception to the rule regarding secondary evidence, that a notice of claim may be proved by parol or by duplicate and the original need not be required.

It was also admissible in connection with admissions of and conversations with defendant, to connect and explain them and show that the action was not prematurely brought.

(11) *Evidence. Credibility.*

Evidence tending to prove that defendant had made statements that he had rehearsed his story with others and would swear the court house out if

necessary, was properly admitted as affecting his veracity, as well as on the ground of public policy.

(12) *Evidence. Motive.*

In an action for breach of contract where plaintiff had permitted defendants to obtain a lease under an option held by plaintiff, the motive which influenced plaintiff to delay before accepting the option, within the time provided for such acceptance, is immaterial.

(13) *Contracts. Evidence. Damages. Values.*

Upon the question of the value of an option, testimony of a real estate broker, as to its value and also as to the value of the property at certain dates and the rate of increase in value of the property during a certain period and the reasons therefor, was admissible both as showing his familiarity with the property and other surrounding property, as a part of his qualification as an expert, and as showing the value of the option.

(14) *Expert Testimony.*

The competency of persons offered as experts is generally a question for the trial court, and unless its ruling is palpably and grossly wrong, it will not be reversed.

(15) *Contracts. Evidence.*

In an action for breach of contract upon the question of the value of an option where it appeared that plaintiff had accepted the option and made use of it as a basis of an agreement with defendant, whether he could have exercised it himself without aid from others or could have gotten anything for it from other parties, is immaterial.

(16) *Contracts. Evidence. Damages.*

Upon the question of the value of an option, turned over to defendant whereby he acquired a lease, evidence as to a statement made by defendant of his price for the lease, as well as a paper containing figures given by defendant to a real estate agent to be used in interesting a prospective purchaser of the leasehold interest shortly before the trial, are admissible as admissions against interest as well as to explain in connection with other evidence the treatment of plaintiff by defendant, after he had acquired plaintiff's rights.

(17) *Contracts. Evidence.*

In an action for breach of contract upon the question of the value of an option where it appeared that plaintiff had accepted the option and made use of it as a basis of an agreement with defendant, whether he paid anything for the option is immaterial.

(18) *Contracts. Evidence. Damages.*

In an action against defendant for breach of contract, upon the question of the value of an option acquired by defendant from plaintiff, evidence offered by defendant tending to prove that the owner of the property had been trying to sell it at a lower figure and had given a previous option at a lower figure, was properly excluded.

(19) Contracts. Evidence. Damages.

In an action against defendant for breach of an agreement, upon the question of the value of an option acquired by defendant as a result of such agreement from plaintiff, evidence as to whether the owner of the property would have allowed plaintiff to accept the option if he had not had a satisfactory financial backer, was immaterial and properly excluded, where it was provided in the option that plaintiff should give bond with sureties satisfactory to the owner, which contemplated such a financial backer and plaintiff testified that he had one before he met defendant.

(20) Expert Evidence. Opinions.

Evidence calling for opinions from witnesses as to the value of the testimony of other experts is properly excluded.

(21) Contracts. Evidence.

In an action against defendant for breach of an agreement upon the question of the value of an option, evidence of an expert as to whether in his experience he had ever known an option on real estate to be sold for any considerable sum was properly excluded.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action of assumpsit brought in the Superior Court for the counties of Providence and Bristol, April 29, 1909, by Albert F. Eastman against William J. Dunn and Daniel C. O'Connor, to recover damages for breach of an express contract set forth in the plaintiff's declaration in two counts.

In the first count the plaintiff sets forth that on or about the first day of May, 1908, he was the owner of and held a certain instrument in writing or option, so-called, from one David F. Sherwood, providing that the plaintiff might lease or purchase on certain terms a certain tract of land bounding on Mathewson and Clemence streets, in the city of Providence; that he was desirous of carrying out the terms of said option and of obtaining money to erect upon said premises a building for the purpose, among other things, of conducting therein an amusement business; that on the date aforesaid the defendants offered to provide the funds for the purposes aforesaid, and that it was then agreed between him and them that he should surrender and turn over this option to them so that they might take, in their own names, a lease of the premises in accordance with the terms of the option; that it

was further agreed by the defendants, in consideration of the surrender and turning over to them of this option, that before the expiration of a year from May 1, 1908, they would erect and in a workmanlike manner finish a substantial building upon the premises, costing not less than \$10,000, and would equip a portion of it suitably for use as a theatre for moving picture performances and such things, and would, thereafter and within a year from the making of the agreement, enter into an agreement in writing which should provide that all three should be equal owners of the amusement business to be carried on in the building, and of the income from the building, and that he should give his time to the management of this amusement business and property, and that the three of them should share equally in the profits of the business after defendants had been reimbursed for their advances.

The plaintiff then alleged in this count that he performed his part of the agreement and surrendered and transferred his option to the defendants, who accepted it and accepted from Mr. Sherwood a lease of the premises in accordance with the option for the period of twenty years after May 1, 1908; and that they failed to carry out their agreement by erecting, completing and equipping a building upon the premises and refused to go forward with the performance of their agreement; that they declined to enter into any contract or agreement with the plaintiff with reference to the ownership, conduct, and management of the amusement business.

In the second count of his declaration the plaintiff alleged that on or about the twentieth day of April, 1908, he was the owner of a certain instrument in writing or option, so called, described as in the first count, and proceeds substantially as in the first count; and further alleges that on that day the defendants agreed to enter into a copartnership with him to conduct and operate a theatre and to carry on an amusement business in Providence; that to that end he agreed for his share in the venture to contribute his interest in this option and to give his time, skill and ability to the conduct and management of this amusement business, and

for their share the defendants agreed to erect and furnish within a year in a workmanlike manner a substantial building on the premises at a cost of not less than \$10,000, and to equip a portion of it for use in the amusement business, and to bear all expenses up to the time said building was ready to be operated for said business; and that it was further agreed that from the first proceeds of this business and from rentals the defendants should be reimbursed for the capital invested in the enterprise, after which all three parties should share equally in the profits and losses of said business and property.

The plaintiff then further alleged in this count that he put the option into the business and caused Mr. Sherwood to execute a lease to the defendants according to the terms of the option and permitted them to be named as lessees in the lease in order to secure them for their investment of \$10,000 in the building to be erected by them upon the premises for the purposes of the partnership; that he has always been ready to perform his part of the agreement, but that the defendants have refused to enter into said copartnership, and to contribute their share toward the partnership business and to erect, complete and equip a building upon the premises and have declared that they would not carry out the agreement. In each count the plaintiff claims \$50,000 damages.

May 4, 1910, the plaintiff filed three additional counts. As the first of these, the third count of the declaration, was withdrawn at the trial, it need not be now considered. The next one was a count in *indebitatus assumpsit* reciting that the defendants were indebted to the plaintiff in the sum of \$50,000 for so much money due and payable from them to the plaintiff for a certain option or right of the plaintiff to purchase and lease certain land, then and there sold and delivered to the defendants at their request, and accepted and used by them, and a lease of the land acquired in accordance with it.

The last count was also in *indebitatus assumpsit* reciting that the defendants were indebted to the plaintiff in the sum

of \$50,000 for various things, among them "for certain work and labor, skill, care and diligence" . . . "performed and bestowed by the plaintiff for the defendants at the defendants' request" . . . and for money paid, laid out and expended to and for the defendants at their instance and request.

The plaintiff also filed a bill of particulars of what was claimed under these additional counts, setting forth two items, one of \$50,000 for the value of the option for a lease from David Sherwood or the lease from Mr. Sherwood to the defendants covering the property at the corner of Clemence and Mathewson streets, in Providence, and dated May 1, 1908, the other of \$5,000 for work and labor done and time spent in relation to removing the old buildings upon this property and for work and labor done, time spent and ideas evolved in developing plans, specifications and blue prints for the erection and equipment of a building upon the property, the interviewing of persons and contractors and for cash expended in reference thereto.

After the filing of this bill of particulars the defendants filed a motion that the plaintiff be required to elect between the original counts of his declaration and the additional counts, on the ground that the latter were inconsistent with the former, being based on the non-existence of an express contract between the parties, while the former were based on the existence of such a contract. This motion was denied by the Superior Court and the exception taken to the ruling is the first exception set forth in the defendants' bill of exceptions.

The case was tried before Mr. Justice Brown and a jury between May 1 and 9, 1911, and resulted in a verdict for the plaintiff for \$18,000, with certain special findings. The defendants did not file a motion for a new trial, but came directly to the Supreme Court upon a bill of exceptions.

The facts of the case are substantially as follows: David F. Sherwood, the owner of the property in question, gave to the plaintiff a written instrument dated March 25, 1908, and filed as Plaintiff's Exhibit 1, by which he offered to sell the

property to the plaintiff for the sum of \$42,000 or to give him a lease of it for twenty years at certain rentals, with a privilege of purchasing it during the first two years for \$45,000; during the next five years for \$47,500, and during the succeeding three years for \$50,000. It provided that the gangway at the southerly boundary of the property must remain open, as provided in the deeds to Mr. Sherwood, and that the lessee must erect within one year after the execution of the lease a substantial building to cost not less than \$10,000, and to become the property of the lessor at the end of the lease, in case the lessee did not purchase the land, and required that a bond be given with sureties satisfactory to Mr. Sherwood that this building would be built as stated.

The option was in the words and figures following:

“PROVIDENCE, R. I., March 25, 1908.

“MR. ALBERT F. EASTMAN,

“ Providence, R. I.

“ DEAR SIR:

“First. I offer to sell you my estates designated as No. 116 Mathewson street and No. 43 Clemence street, in the City of Providence, said estates together running from Mathewson street to Clemence street, for the sum of Forty-two Thousand Dollars (\$42,000).

“Second. I offer to lease you the above estates for the term of twenty (20) years from April 20th, 1908, at the following rental: For the first ten years, \$1,680 per year, and for the next succeeding ten years, \$2,520 per year, said rent to be payable quarterly, *provided* that you pay in addition all current taxes, curbing assessments, sewer assessments and assessments of every kind which may be imposed upon said property during the continuance of the lease, so that the above named rental shall be net to me.

“*Provided*, further, that you shall erect within one year after the execution of the lease, a substantial building, which shall cost not less than Ten Thousand Dollars (\$10,000), which shall have proper foundation and which shall be erected

in accordance with the Building Laws of the City of Providence. And *provided*, further, that you shall give a bond with sureties satisfactory to me, that such building will be erected as above stated. And said building and any improvements made by you upon these estates shall become the property of myself, my heirs and assigns, upon the termination of the lease, unless you elect to purchase the estates as hereinafter provided.

"In case you take the lease of said estates, you are to have the privilege at any time during the first two years of the same to purchase the property for the sum of Forty-five Thousand Dollars (\$45,000); during the succeeding five years for the sum of Forty-seven Thousand Five Hundred Dollars (\$47,500); and during the succeeding three years for the sum of Fifty Thousand Dollars (\$50,000). *Provided*, that at any of the above times at which you may elect to purchase the same, you shall give one month's notice in writing to me; and *provided*, further, that all taxes and assessments which are imposed or ordered to be imposed prior to the transfer of the title shall be paid by you.

"The above offers of sale and of lease are expressly subject to the condition that the gang-way at the southerly boundary of said property, between Mathewson and Clemence streets, shall remain open as provided in the deeds to me, and also subject to the conditions and agreements as to party walls contained in the agreement between William H. Hall and Herbert D. Goff, Trustees of the Central Real Estate Company, and myself, which agreement is duly recorded in the land records of the City of Providence; and if you elect to take a lease of said premises, any payment or money or any other obligations resting upon me by the terms of said party wall agreement shall be assumed by you during the term of said lease.

"You further understand that the premises are now rented to tenants who hold from month to month and that it would be necessary to give sixteen days notice in writing prior to

the first of any month in order to have said premises vacated by the tenants.

"Rents from present tenants shall be apportioned if the deed or lease running to you is signed other than at the first of the month.

"This offer for you to purchase or lease the above described premises shall remain open for twenty-five (25) days from this date.

"Yours very truly,

(Signed)

"DAVID F. SHERWOOD."

This instrument expired by its terms on April 19, 1908; but Sherwood agreed and so admits, that as the 19th of April fell on Sunday, he considered that the option stood open until Monday, April 20th, and acted on that understanding.

The plaintiff had obtained the offer or option in furtherance of a plan for having a building erected on the property, in which he could run a moving picture theatre, which he believed would be profitable. He and his wife hoped to be able to provide the necessary money themselves for erecting the building, but found that to be impossible and abandoned that idea not long after he got the option.

He then sought to find some one to go into the enterprise with him and put up the necessary money. Very shortly before the option was to expire he heard of the defendants as persons who might be induced to go into such a proposition and he arranged an interview with them. A few days before this interview took place he went to Mr. Sherwood and asked for an extension of time for accepting the offer, which was refused.

The interview took place at the Narragansett Hotel in Providence, the plaintiff giving the date of it as April 18, and other witnesses on the subject as April 20, the 19th being Sunday. What occurred at this interview is in dispute, the plaintiff claiming that the defendants then and there made with him the contract on which he brought suit and the defendants denying this. It is admitted that the interview

ended about six o'clock in the evening, and that at its conclusion the plaintiff called up Mr. Sherwood at the latter's house over the telephone and arranged to meet him at the Union Station in Providence, where Mr. Sherwood was then about to go.

The plaintiff and the defendant Dunn had a short interview with Mr. Sherwood at the station, but what occurred there is in dispute, the plaintiff stating that he simply told Mr. Sherwood that he accepted the offer for a lease and introduced Mr. Dunn to him as the man who would go on the plaintiff's bond as required by the option and that Mr. Sherwood agreed and told them to meet him Monday afternoon at the office of Mr. Pirce, of Gardner, Pirce & Thornley, Mr. Sherwood's counsel. Mr. Sherwood and Mr. Dunn both testified that nothing was settled at this interview, but that Mr. Dunn said that he was interested in the matter and asked for an extension of time to consider it, which Mr. Sherwood refused, except that he agreed to hold the matter open till the next day.

On Monday afternoon according to the plaintiff, on Tuesday afternoon according to other witnesses, the parties and Mr. Sherwood and Mr. Washburn, Mr. Sherwood's broker, met with Mr. Pirce in the latter's office and discussed matters, and it was arranged that a formal instrument of acceptance or contract should be drawn, to be executed at a meeting of all parties to be held in Mr. Pirce's office the next Thursday afternoon.

Late in the afternoon of the next Thursday, April 23, the second meeting in Mr. Pirce's office took place, the persons present being Messrs. Pirce, Sherwood, Washburn, Eastman, Dunn, O'Connor and O'Donahue, attorney for Dunn and O'Connor. At this meeting a formal contract between Sherwood on one side and Dunn and O'Connor on the other was drawn up after a long discussion of terms between them and their counsel, in which discussion Eastman took no part.

Just before executing this contract, Mr. Sherwood called Mr. Eastman's attention to the fact that the latter's name was not mentioned in it and asked him if that was satisfactory to him. Mr. Eastman replied that it was; that he had an understanding or arrangement or agreement, as different witnesses put it, with Dunn and O'Connor. The contract was then executed by the parties to it, and is on file as an exhibit in the case.

The contract provided for the execution of a lease from Sherwood to Dunn and O'Connor on May 1, 1908, and one was drawn up and was executed on that day at a meeting in Mr. Pirce's office which Eastman did not attend. This lease is also on file as an exhibit in the case.

All these instruments provided that the lessee or lessees should erect on the leased premises within one year after the execution of the lease a building to cost not less than \$10,000.

Accordingly very soon after the lease was executed some small buildings upon the premises were sold to a man, who removed them, and the defendants employed a contractor to excavate for the proposed building. Shortly after this an application for a building permit in the name of "Wm. J. Dunn et al." was filed at the city hall in Providence by the authority of Mr. O'Connor, Mr. Dunn having meantime gone to Europe. The purpose of the proposed building was given as "theatre, business building and hall." The work of excavating was continued steadily for somewhere about six weeks, when it was stopped, because Mr. O'Connor was unwilling to go further in Mr. Dunn's absence. After that work was done only at irregular intervals, without accomplishing much, because upon Mr. Dunn's return in September he and Mr. O'Connor quarreled and would have nothing to do with each other. During much of this time the plaintiff was present and overseeing the work, looking to the erection and completion of the building as agreed.

In the fall of that year the plaintiff had an interview or two with Mr. Dunn at which the plaintiff asked what was going to be done and was told by Mr. Dunn that the defend-

ants were not agreeing, but that he would see what could be done and take the matter up with the plaintiff later. On December 9, 1908, Mr. Dunn wrote the plaintiff a letter asking when he could meet him at the Narragansett Hotel. Soon after that they met at the hotel and talked the situation over. Just what took place at that interview is in some dispute, but it is agreed that Mr. Dunn told Mr. Eastman that he didn't propose to have anything more to do with Mr. O'Connor, but intimated that he would try to get the latter's interest in the property and suggested to Mr. Eastman that he go to some architect and have plans drawn of a building that would suit Mr. Eastman's purposes and provide also for a hall that could be rented and bring in a good income.

In accordance with this suggestion the plaintiff had several interviews with some architects and had some plans drawn. He then saw some contractors and had them make estimates of the cost of erecting a building in accordance with the plans. He and Mr. Dunn also had several interviews with representatives of the Knights of Columbus, who were looking for a hall and club rooms, and tried to arrange satisfactory terms with them for leasing to them the rest of the building besides what would be needed for a theatre. As no agreement could be reached with them, the whole matter remained in abeyance. The plaintiff, after vainly trying to get some further information from the defendants whether or not they proposed to carry out their agreement with him, on March 26th, 1909, wrote to each a letter which is substantially a notice that he would be obliged to resort to legal proceedings to protect his rights; to these letters he received no reply. On April 29, 1909, having got no definite assurances from either of the defendants as to what they would do, the plaintiff brought the present action.

The plaintiff testified that when he got the so-called option from Mr. Sherwood, he had expected that enough money could be collected in on accounts due to his wife to enable him to construct a building on the premises as required by the terms of the option; that he soon found, prob-

ably within two weeks, that this could not be done and that he then tried to raise the necessary money by interesting somebody else, but had not found anybody interested until he met the defendants.

He said that about the Tuesday or Wednesday before the option would expire he went to Mr. Sherwood and asked for an extension of time on it, but did not get it. About this time he told a Mr. Fahey about the option and that he had not been able to get the money from the source from which he expected it and Mr. Fahey suggested that he knew two men who he thought would put up a building there, if they could be shown it was a good investment. An interview with them was arranged and he met them, according to the plaintiff's testimony, about eleven o'clock in the morning, on Saturday, April 18.

He says that he told the defendants that he had secured a piece of property on Mathewson street for the purpose of erecting a theatre to be used for a moving picture show and hadn't been able to get the money from the source from which he had expected to get it and was ready to talk with anybody who would erect a building for him. He says they examined the option and all went and looked at the property. After returning to the hotel he told them, he says, that he would agree that if a person would put in the money that was necessary to build the building on that land, he would allow the entire revenue of the property to revert to the people who spent the money until they had got back the money they had spent and then they would all be equal owners. He suggested a moving picture business and a hall upstairs was discussed.

It was finally agreed, he testified, that the defendants should put up the building for him, that he should take entire charge of the property, run a moving picture or other theatrical business there and take a living salary from the proceeds of the business from the time he took possession of the building until they had been entirely reimbursed for the money they had spent, and then all should share equally

in the profits of the business and the income from the building, he guaranteeing that he would pay them back at the rate of \$5,000 a year or lose all his interest in the business. He was not to put any money into the enterprise. He told them that anything that was beneficial to all of them he would agree to, and it was agreed that the defendants could take the lease in their own names as security for the money they were to spend in putting up the building. After the matter had been all talked over until late in the afternoon, he said, Mr. Dunn and Mr. O'Connor went one side and came back and Mr. Dunn said, "Well, I guess we will accept that proposition. Now, then, you would better see Mr. Sherwood, as I am desirous of getting this thing closed up while I am here."

Mr. Eastman then called up Mr. Sherwood and talked to him on the telephone. He did not then accept the option, but arranged to meet Mr. Sherwood at the railroad station a little bit later. Eastman and Dunn then went over to the station and met Sherwood. Eastman testified that Dunn told him on the way over to tell Sherwood that he would go on Eastman's bond for \$10,000; that when they met Sherwood, he, Eastman, said to him, "I want to accept the lease under the option and Mr. Dunn will go on my bond," and that Sherwood said, "All right. I don't know Mr. Dunn personally, but I have heard of him and I will accept him as surety." Then Sherwood suggested that they all meet in Mr. Pirce's office the next Monday, and it was so arranged. On cross examination he testified that he introduced Dunn to Sherwood and told the latter that he knew that it was necessary by his option to furnish a bondsman satisfactory to Sherwood.

The plaintiff also testified that the next meeting of the parties took place in Mr. Pirce's office on Monday afternoon. There they made arrangements for a drawing of a letter of acceptance, which he told Mr. Pirce to draw in the name of Dunn and O'Connor, and then adjourned to Thursday afternoon at the same place, when the formal agreement

was drawn and executed. He testified further that he was to get an agreement in writing and that at the meeting on Thursday, when the agreement between Sherwood and Dunn and O'Connor had been executed, he said to the two latter, "Now, gentlemen, I think it will be a good time to draw up our agreement," but that Dunn postponed it a few days on account of the lateness of the hour. This conversation took place in the presence of all the persons who attended this meeting, he said.

He said that he tried afterwards, repeatedly to get the defendants to enter into a written agreement with him, and that they separately promised to do so, but that he never could get them together. He said that he took part in negotiating the sale of the buildings on the premises to the man who removed them, went to Boston at O'Connor's request to look at some theatre chairs which the latter had bought and made some trips to other cities on his own account to get ideas for the moving picture theatre business. He also put on the stand two men to testify as to statements made by the defendants with reference to the plaintiff. Of these, Patrick J. Hennessy testified that while Dunn was gone abroad, he asked O'Connor who Eastman was, having seen him around the premises while the excavation was going on, and that O'Connor told him that he and Dunn had the lease and were going to build a theatre there and that Eastman was to have charge of it; that they were going in on equal shares; that Eastman was to have a salary and the rest of the returns from the building was to go to Dunn and O'Connor and after the building was paid for they were to be equal partners in the building. He testified that O'Connor said that Eastman was a partner with them.

The other man, Frank Slavin, the contractor who did the excavating, testified that while he was working there he had asked O'Connor about Eastman, and O'Connor had told him that Eastman was going to run a theatre there, when it was ready. He also said that later he saw Dunn in Fall River and asked him who Eastman was and that Dunn said,

"Well, he is a partner with us and after we get this thing completed we expect he is going to run it."

The plaintiff, against the objection of the defendants, introduced evidence by three real estate brokers as to the value of the land involved in the case, as to how much in their opinion it would increase in value during the period of ten years following the spring of 1908, how much profits in their opinion could be made by exercising the privilege provided for in the option of buying the property at the end of ten years for \$50,000, and how much the present value of that profit would be in the spring of 1908, which they gave as their estimate of the value of the option. These estimates were upwards of \$23,000. This testimony was introduced on the theory, insisted on by the plaintiff and denied by the defendants, that the value of the option could be recovered from the defendants and that its value could be shown in this way.

The plaintiff also introduced evidence of what the defendant Dunn had asked for the defendants' leasehold interest and estimates which he had given to a broker to be shown to a prospective buyer. These amounts ran from \$23,000 to \$30,000. The defendants objected to all these lines of testimony as to the value of the option, and their objections were overruled and exceptions noted. They then introduced the testimony of three real estate men to the effect that the probable increase in the value of the property was highly speculative and a matter of individual opinion, and that in their opinion all that a man holding such an option as the plaintiff had could expect to get for it was the equivalent of the ordinary broker's commission, which would figure about \$570.

As to the events leading to the taking of the lease by the defendants, they and their witnesses tell a very different story from that of the plaintiff. O'Connor testified that he first met Eastman on Saturday, April 18, about noon, at the Union station, in Providence; that Fahey introduced them and they talked about the Mathewson street property; that

Eastman said that his time was expiring and wanted to know whether Dunn and O'Connor were interested in it or not; that he told Eastman that Dunn would be in the city Monday and they would talk it over; that Eastman said that that would be too late, as the option would expire; that Eastman wanted to know if he couldn't help him to get an extension of time and seemed so concerned about the matter that he suggested that Eastman and Fahey go and see Mr. Sherwood and ask for an extension; that he told Fahey that he could use Dunn's name and his, if he needed to; and that the other two left him and went off to see Mr. Sherwood.

Mr. Sherwood testified that on the Saturday before the option expired Eastman and Fahey came to his office in the afternoon and requested an extension of time, which he refused to give; that Eastman did not at that time accept the option, but said that Mr. Dunn, of Fall River, who was a man of means, was interested in the matter and would go on his bond; that Fahey said that Dunn was worth half a million dollars and was absolutely responsible, and he replied that if that was so Dunn would be acceptable; that the date of the expiration of the option was spoken of, and as it ran out on the 19th, the next day, which was Sunday, he told Eastman that he considered that it would include Monday, and that he did not see Eastman again until Monday afternoon or evening at the depot.

As to the meeting of the parties at the Narragansett hotel, both of the defendants testified that that took place on Monday, and O'Donahue, who came in just as it was breaking up, testified to the same date, which he verified from his diary, and said was the Monday after Easter. Both Dunn and O'Connor testified that they did not make any contract with Eastman to build a theatre building on the premises, in which a theatrical business should be carried on by Eastman for the equal profit of all three, or agree to put any arrangement between them into writing; that on the contrary they refused to consider the proposition from a theatrical standpoint, but would simply look at it from an

investment standpoint, whether a building on the premises would be a good investment; that Eastman said that he could not exercise the option or accept the offer, as the time was just about up and he had not been able to do anything with it; that finally Eastman said that if Dunn and O'Connor would take the option, he would trust them to do right by him; that they told him that if they took it over and decided to put up a theatre there, they would certainly look after him, if he cared to go into the theatrical business there, and give him first chance; but that they did not at that time decide to take up the proposition at all, and it was suggested that Mr. Sherwood be asked to hold the matter open a little longer.

At the meeting with Mr. Sherwood at the Union Station at the conclusion of this interview, about six o'clock, according to Mr. Dunn's testimony, Mr. Eastman stated that this was Mr. Dunn, of Fall River, who was interested in the property, and that he would like to have the thing held up for a day or two; Mr. Sherwood said that the time was up that night and Mr. Dunn told him that he had only met Mr. Eastman that day and had not had sufficient opportunity to look over the property to decide on it then, but that if Mr. Sherwood would give an extension, he might do it. Mr. Dunn said that he would like three or four days, but Mr. Sherwood said that he wouldn't give three or four days, but would give until the next day. Mr. Eastman did not accept the option and took no part in the conversation, except to say, "This is Mr. Dunn, of Fall River, and I have got him interested in that property." Mr. Sherwood's testimony as to what took place at this interview is the same as Mr. Dunn's in every particular. He fixed the date as Monday, April 20, and said that the option was not accepted then, but was held over until the next day at Mr. Dunn's request.

According to Mr. Sherwood and Mr. O'Connor, the latter and Mr. Fahey came to see the former on Tuesday morning, and O'Connor testified that he then tried unsuccessfully to get Sherwood to give better terms. According to the testi-

mony of the defendants and of Mr. Sherwood and Mr. Pirce, the first meeting of all the parties interested took place in Mr. Pirce's office on Tuesday afternoon.

The defendants both denied that they made the statements testified to by Hennessy and Slavin as to Eastman's being a partner with them, and both testified that O'Connor had nothing to do with Dunn's causing the plaintiff to see architects and contractors and the Knights of Columbus in the fall of 1908 and the winter following. All that work was done at Dunn's suggestion after he had informed the plaintiff that he and O'Connor were not working together and were not even on speaking terms.

During the taking of testimony at the trial many exceptions were taken by both sides, and at the conclusion of the testimony the defendants made a motion that the jury be directed to return a verdict for them on the fourth count of the declaration, and a similar motion as to the fifth count, and motions that these counts be withdrawn from the consideration of the jury, and also that they be struck out as not supported by the evidence. All these motions were denied and exceptions taken.

They then made a motion that the plaintiff be required to elect whether he would rely on the first two counts of his declaration, those in special *assumpsit*, or on the last two counts, those in *indebitatus assumpsit*. When that motion was denied and an exception noted, the defendants made a motion that the jury be directed to find separately upon the issues presented in each count of the declaration submitted to them and this motion was denied unless the defendants would prepare special issues for the purpose, which the defendants declined to do and took an exception to the ruling of the court.

The defendants then made a motion that a certain special issue be submitted to the jury as being a short statement of the issue raised by the second count of the plaintiff's declaration, and this motion was denied and an exception noted. A number of exceptions were also taken by the defendants to

certain parts of the court's instructions to the jury, and also to the refusal of the court to give certain instructions requested by them.

The jury returned a verdict for the plaintiff in the sum of \$18,000, as already stated, and in answer to questions submitted to them for special findings they found as follows:

(1) The plaintiff did accept the Sherwood option dated March 25, 1908, and the right to the lease thereunder.

(2) The plaintiff did not transfer his rights under said option to the defendants as a gift, trusting to their generosity and sense of fairness.

(3) The plaintiff did, in assenting to the lease mentioned in the option signed by Sherwood, dated March 25, 1908, being executed in the names of the defendants as lessees, do so in consideration of an agreement between him and the defendants to the effect that they should erect a building on the premises in which a moving picture show should be conducted substantially as testified to by the plaintiff.

Within seven days after this verdict was rendered the defendants, without filing a motion for a new trial, filed notice of their intention to prosecute a bill of exceptions. In due time a bill of exceptions and a complete transcript of the testimony, etc., were filed and allowed in the Superior Court and the case transmitted to this court, and is now before us on the merits of the defendants' exceptions.

Of the ninety-five exceptions set forth in the defendants' bill of exceptions they do not now insist upon those numbered 2, 3, 4, 5, 7, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30, 35, 36, 42, 46, 48, 49, 50, 51, 58, 62, 65, 67, 68, 71 and 73. Many of the others group themselves under a comparatively few heads and some need be considered only incidentally. The defendants assert that a decision of the two principal questions involved in the case will dispose of the great majority of them, and that the questions arising for discussion are as follows:

1. On the facts of this case can any recovery be had on counts in *indebitatus assumpsit*?

2. Was the plaintiff entitled to go to the jury both on the first two counts of his declaration and also on the last two counts?

3. What was the proper measure of damages on the facts of this case?

4. Was there any evidence to support a verdict on any of the counts of the declaration for more than nominal damages?

5. Was it reversible error on the part of the trial court to refuse the defendants' motion that the jury be instructed to find separately upon the issues presented in each count of the declaration and to refuse to submit to the jury the special issue requested by the defendants?

6. Was there reversible error on the part of the trial court in giving any of the instructions excepted to by the defendants?

7. Was there reversible error in refusing to give any of the instructions requested by the defendants?

8. Did any of the rulings made during the taking of testimony at the trial constitute reversible error?

- (1) Defendants strenuously contend that the several counts in the declaration as finally amended, the first and second counts being for damages for breach of an express contract, while the fourth is a count in *indebitatus assumpsit*, for the value of the option purchased from the plaintiff by the defendants, as above set forth, and the fifth count is for labor and services performed at the request of the defendants, are inconsistent counts, and by motions at different stages of the case, both before the case was on trial and after the evidence was closed, sought to have the trial court order the plaintiff to elect whether to proceed on the first two counts or the later counts. It is to be noted that no demurrer was filed, either to the declaration as a whole or to the counts, but the defendants pleaded the general issue to each. We do not find that the court below erred in refusing to order the plaintiff to elect under the motions. The action is *assumpsit* and the several counts are all in *assumpsit*, and theoretically

each count is for a different cause of action, the first for damages arising from breach of an express contract for failure on the part of the defendants to do certain things; the second for damages arising from breach of an express contract stated in slightly different terms to do certain other things; the fourth on an implied contract to pay for the option above set forth sold and transferred to the defendants at their request; the fifth on an implied contract to pay for labor and services done by the plaintiff for the defendants at their request. We see nothing inconsistent in the joining of these counts in one action, the parties being the same in each instance, and the matters alleged growing out of the same transaction. It is merely the ordinary instance of the pleader setting forth his cause of action in different counts, so that if he failed of proof upon one count he might succeed upon another. "Before the pleading rules, Hil. T. 4 W 4 r. 5, a declaration might consist of numerous counts, and the jury might assess entire or distinct damages on all the counts; and it was usual, particularly in *assumpsit* and in actions on the case, to set forth the plaintiff's same cause of action *in various shapes*, in different counts, so that if he failed in the proof of one count he might succeed upon another. Such additional counts have been aptly termed *safety valves*." I Chit. Pl. (16 Am. Ed.) page 424; 5 Encyc. Pl. & Pr. 324; *Ware v. Reese*, 59 Ga. 588; *Wilson v. Smith*, 61 Cal. 209; *Whitney v. Chicago &c. Co.* 27 Wis. 327; *Stearns v. Dubois*, 55 Ind. 257; *Snyder v. Snyder*, 25 Ind. 399; *Sadler v. Olmstead*, 79 Ia. 121; See, also, *Rawlinson v. Shaw*, 117 Mich. 5; *Ralph v. Taylor*, 33 R. I. 503.

In this case, if the plaintiff failed to satisfy the jury that he had any such express contract as set forth either in the first count or in the second count, he might still be entitled to recover under the fourth count for the value of the option as sold and transferred, upon proof that the option was valuable; and might also recover for the value of his labor and services under the fifth count upon proper proof. We are of the opinion that he was entitled to file these counts

originally under the general practice long established in this State; and that to have compelled him to elect after the evidence was closed, whether to proceed to the jury under the first two counts or under the last two counts, would have been error, because it would have compelled him to determine beforehand for himself upon the sufficiency of the evidence before the jury, instead of leaving it to the jury to determine for themselves as to the sufficiency of the evidence to support any or either of the counts, thereby depriving him of the very benefit to which he was entitled under the rules of pleading permitting the filing of the several counts. The defendants were afforded the opportunity by the court at the trial, after the evidence was closed, to submit special issues to the jury under each count of the declaration, whereby, if they saw fit, the defendants might have so framed the issues as to have determined upon what counts the jury founded their verdict, and the amount of damages awarded under each or any of the counts. This the defendants (2) declined to do, and they cannot now complain. Furthermore, inasmuch as the jury have found by their third special finding that there was an express contract between the plaintiff and the defendants substantially as testified to by the plaintiff, we think it is to be inferred that the general verdict of the jury was based upon the breach of such an express contract, and was an award of damages for such breach, based upon the testimony as to the value of the option transferred to the defendants; and that therefore the verdict of the jury was found under the first or second count of the declaration, and not under the fourth or fifth count, for reasons to be hereafter more fully developed. The exceptions based upon the refusal of the court below to require the plaintiff to elect between the first two and last two counts (Ex. 1 & 83) are therefore overruled.

A very large part of the argument of the defendants is devoted to an endeavor to show that the parties to this suit at the outset entered into a partnership agreement for the development of a theatrical or amusement business; and that

the plaintiff in this suit is endeavoring to maintain an action for the breach of a partnership agreement, and thereupon argues most persistently that such an action cannot be maintained at law; but contends that the plaintiff's only remedy is in equity for a dissolution of the partnership and settlement of the partnership accounts. We find no warrant for this contention under the evidence.

The defendants undoubtedly led the plaintiff to believe that they would enter into a partnership with him in the amusement business, upon the fulfillment of certain conditions, ultimately, but there is nothing to show that either at the time when the plaintiff transferred his option to the defendants and allowed them to procure the making of the lease to them as security for the advances they agreed to make, or at any later time these parties had actually formed a partnership. The defendants took the lease in their own name, and the plaintiff was in no way responsible for the rent, nor had he any right thereunder either to occupation of the land or to make purchase thereof. The defendants were to build the building under the terms of the lease, and it was to be their property, in case they exercised their option to purchase, or Sherwood's if they did not, and they alone would be liable for expenses incurred in its building and equipment. The position of Eastman under his contract with the defendants, which he proved to the satisfaction of the jury, as shown by their special finding, was to be that of an employee of the defendants, having the right to occupy the building and run the business, taking only a living salary from the proceeds thereof, until such time as the profits of the business should have been sufficient to pay off all the advances of the defendants, at the rate of not less than \$5,000 per year. After that had been done and then only was there to be any such relation between the parties as would constitute a partnership, and then only in the business, but not in the building or the real estate or leasehold. If Eastman did not succeed in paying from the business agreed to be under his charge, at the rate of \$5,000 a year, until all the

defendants' advances were paid, he was to cease to have any interest whatever. It is plain therefore that the entire agreement between the parties was in no sense at any time a partnership agreement, but rather an agreement looking forward to the formation of a partnership in the future, in the event that Eastman succeeded in making it profitable to the extent that he anticipated, and that in the meantime he was to be in the position of a salaried employee of the defendants and a sublessee of the property. It might be that the conditions to be developed would never lead to the formation of the partnership, because the profits of the business might never be sufficient to fulfill the conditions upon which alone Eastman could ever become a partner and entitled to one-third of the profits. Since the defendants by their conduct, after they had obtained from the plaintiff his option for a lease and purchase of the property, and thereupon had secured the lease in their own names, in abandoning work on the building and declining to proceed with the undertaking, did nothing which in effect was of the slightest value to the plaintiff, and repudiated any legal obligation to him, claiming, that they never at any time had any binding contract with him, thus showing that they never intended in good faith to enable him to get any return for either his services or his option, they placed themselves in the position of having received from him a valuable option and valuable services contributed by him toward the contemplated enterprise, without ever paying him or intending to pay him any valuable consideration whatever for the same; so that in effect, while the plaintiff in good faith had done all that he agreed to do, and contributed all that he had agreed to contribute so far as he was permitted to do so, the defendants entirely failed to perform the contract or any portion thereof on their part to be performed, and in legal effect, are in the same situation toward the plaintiff as if they had never done anything in fulfillment of their contract. The claim on the part of the defendants, therefore, that the contract on their part was partly fulfilled, cannot be maintained. By their

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failure to carry out their part of the contract the defendants have made it impossible forever to determine what would have been the value of the contract, if carried out, to the plaintiff; so that, on the theory argued by defendants' counsel that the plaintiff can only recover what the value of the contract would have been to him, if it had been fully carried out by the defendants, they have by their own conduct, and by their repudiation of all legal obligation to him, made it impossible for the plaintiff to recover anything. Such a theory is so unjust in its application to the facts of this case, that the mere statement of it sufficiently refutes it. It is plain that a contract of the nature above set forth, is one which cannot be enforced, if, as in this case, the defendants see fit to repudiate it, and it makes no difference whether it is non-enforceable as being within the statute of frauds, or for reasons inherent in the very nature of the contract. The case is closely analogous to those cases which have frequently arisen, where upon agreement for the sale or exchange of land, the plaintiff has fulfilled his part of the contract by making conveyance of his land to the defendant, and the defendant has refused either to pay the agreed price or to convey land agreed to be conveyed in exchange; or where in consideration of labor and services or materials supplied by the plaintiff in making repairs or planting and cultivating the soil, or of money or its equivalent paid, the defendant has agreed to convey land, and after receiving the agreed consideration, refuses to fulfill his contract. In all these cases it has been repeatedly held that the plaintiff is entitled to recover at law in *assumpsit* either the value of the land conveyed by him, or the value of the consideration advanced by him, whether in money or materials or labor. *Basford v. Pearson*, 9 Allen, 387; *Root v. Burt*, 118 Mass. 521; *Williams v. Bemis*, 108 Mass. 93; *Kneeland v. Fuller*, 51 Me. 518; *Moody v. Smith*, 70 N. Y. 598; *Smith v. Smith*, 4 Dutcher (28 N. J. L.) 208.

We think the case at bar is quite analogous in principle to the cases cited. While it is true that the plaintiff did not

in fact convey to these defendants an actual estate in land, yet he did under the contract he made with them turn over to them his option whereby they became entitled to receive and did in fact receive a valuable lease of property in one of the best business districts of Providence, with an option of purchase of the real estate upon favorable terms. He did also, in accordance with his agreement, looking to an ultimate partnership interest, devote his time and services at their request in the endeavor to carry out the agreement; through no fault of his, by their own subsequent acts, they failed to so carry out the agreement as to enable him to receive any consideration whatever either for the option or for his services and ultimately repudiated and denied any legal or contractual obligation to him whatever, thus showing that they never intended to act in good faith in carrying out any agreement with him. Under these circumstances this court is of the opinion that the plaintiff, in this action is entitled to recover both the value of the option so surrendered to the defendants and of which they have availed themselves, and for the value of his services rendered at the outset of the work looking toward the erection and equipment of the building.

The case at bar is quite analogous to those cases where there has been an agreement to form a partnership, but no partnership business has in fact been done, and the defendants after receiving value, either by way of money contribution, or of labor and services, or of business done by the defendants for their own benefit which should have been partnership business, have been held liable in assumpsit either for the money contributed by the plaintiff, or for labor and services rendered, or for the profits on the work done. *Hale v. Wilson*, 112 Mass. 444, 449; *Vance v. Blair*, 18 Ohio, 532; *Currier v. Webster*, 45 N. H. 233; 2 Bates, Law of Partnership, §§ 870-876 & cas. cit.

In the case of *United States v. Behan*, 110 U. S. 338, Behan, the defendant in error, had been engaged in doing work in the improvement of the harbor of New Orleans under

a government contract and had expended a large amount of money for machinery, labor and materials, including his own labor in carrying on the work; before the work was finished, and before he had received any money under the contract, the work was abandoned by the government and he was prevented from finishing the work under the contract; it was found that there was no satisfactory evidence as to what would have been his profit under the contract, if completed. The United States Supreme Court, after stating fully the findings of fact and conclusions of law of the court of claims, and in support of the same says, p. 343: "We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses.

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards per-

formance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

"The rule as stated in *Speed's* case is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in *Speed's* case, and his *profits* will be measured by 'the difference between the cost of doing the work and what he was to receive for it,' etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something

more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits.

“When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.” . . .

“It is to be observed that when it is said in some of the books, that where one party puts an end to the contract the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The dis-

inction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has (not) been damaged to the extent of his actual loss and outlay fairly incurred."

- We are of the opinion that the rule of damages set forth in the above quotation is quite applicable to the facts shown in the case at bar. While the plaintiff has not shown that
- (4) he actually spent any considerable sum of money in attempting to fulfill his part of the contract, yet he has shown that he devoted a large amount of time to the enterprise at the request of either or both of the defendants, who as they were acting together as lessees of the property, must be deemed to be agents, each for the other, in matters relating to their common interests; and he has further shown, to the satisfaction of the jury, that he also turned over to them his accepted option whereby they were enabled to obtain a valuable lease of property situate in the "retail district" of Providence in a very valuable location, said lease containing a valuable option of purchase. We are unable to see what difference it makes whether the plaintiff actually conveyed valuable real estate to the defendants for which they refused to pay, or whether, by virtue of his accepted option, he enabled them to get title to such real estate; he did actually enable them to obtain such property, and they, repudiating their contract with him, availed themselves of the value thereof. This property was indeed the foundation of the entire enterprise into which the plaintiff appears to have entered in good faith with the defendants, without which such enterprise would have been impossible. The value of the option and of the lease obtained by the defendants thereunder has been shown, by the evidence of expert real estate men, giving the best evidence obtainable thereof, to

have been upwards of \$23,000 at the time when it was procured, and we see no reason to doubt that such value was a fair and reasonable one, having in mind the situation of the property, its then value, its probable increase in value, and the favorable terms of purchase contained therein. The claim on the part of the defendants that the plaintiff is at most entitled to recover a mere broker's commission of less than \$600 is quite untenable under the facts. He was not acting as a broker as between Sherwood and the defendants. He was not attempting as the agent of Sherwood to place a right to the lease in the hands of parties who would take it, for the benefit of Sherwood, but he was acting for himself in the attempt to build up a business which he believed would be profitable to him and to the defendants in the future, and he furnished the foundation upon which such a business could have been built. We are of the opinion that the evidence amply supports the special findings of the jury that the plaintiff did accept the option, that he did not transfer his rights thereunder as a gift trusting to the generosity and fairness of the defendants, and that, in assenting to the lease being executed to the defendants as lessees, he did so in consideration of an agreement between him and the defendants, substantially as he testified. And inasmuch as the jury by their general verdict found only the sum of \$18,000, which is many thousand dollars less than was testified to as the probable value of the option, we are led to believe that the jury took a very conservative view of the values testified to by the experts, which were corroborated by the values shown to have been placed thereon by one of the defendants, and that they took into account the uncertainties which always exist as to the future increase of value of real estate; and we are further led to believe, in view of these considerations, that the verdict of the jury was based solely upon the value of the option and this lease obtained thereunder, and not upon the services claimed to have been rendered by

(5) the plaintiff, because of the fact that he was unable to furnish definite testimony either as to the actual amount of

- (5) time spent by him, or as to expense incurred. As we have before shown, the defendants had every opportunity, if they had seen fit, to have submitted such issues to the jury under each count, as to have ascertained definitely, whether the jury found under one or more of the counts, and the amounts of such findings; but they refused to avail themselves of such opportunity. We think they are not now entitled to complain of the verdict, which, as we have shown, is conservative and evidently based upon the value of the option alone. We think, therefore, that the verdict of the jury was fully supported by the evidence, and that the rule of damages given to them by the court and under which they found such verdict was a proper rule under the circumstances of the case.

These considerations dispose of a very large number of the entire sixty-one exceptions which are pressed before this court. A large number of them are based upon the mistaken conception of the defendants' counsel as to the proper rules of pleading in relation to the inclusion of the several counts in one declaration, and as to the admissibility of testimony to prove the damages which the plaintiff is entitled to recover; and many of them are based upon an erroneous view of the testimony with regard to the relations of the parties, in the endeavor on the part of the defendants to sustain the position that the parties were partners and therefore no action at law could be maintained for breach of a partnership contract. It would be futile and would unduly extend the limits of this opinion if we should take up in detail each one of the defendants' exceptions. Indeed, counsel for the defendants substantially admits this in his brief, and has discussed only a few of the exceptions specifically. We therefore proceed to discuss only such of the specific exceptions as have not already been substantially overruled.

The subject of the defendants' 85th exception is the refusal by the trial judge to submit to the jury a special finding in the following form, to wit.: "Did the defendants

agree with the plaintiff to enter into a partnership with him for the acceptance of the Sherwood option and the erection of a building for theatrical purposes, with money to be furnished by the defendants, and the operation of a theatre in said building and to divide the net profits of the business between them, as claimed by the plaintiff?"

The defendants' counsel asked that this be submitted to the jury as a short statement of the most vital part of the second count, but the trial justice refused to allow it; we find no error in such refusal. This is one of the attempts on the part of the defendants to obtain a finding that there was an agreement for a present partnership between the parties. As we have already shown, there was no evidence of such agreement nor is any such agreement set forth in the second count, as is attempted to be submitted in the above quoted language. The refusal to submit it was proper and the exception is overruled.

Certain instructions referred to in the 88th and 89th exceptions are substantially as follows: At the bottom of page 807 of the transcript, the trial justice told the jury that notice of the acceptance of an option need not be given verbally where the acceptance is sufficiently indicated by subsequent acts or conduct of the parties; and that if from the acts and conduct of Mr. Eastman and Mr. Sherwood, both understood that Eastman had accepted the option and he did accept in this way, in that case he had a right which can be recognized in law, and, if valuable, would entitle him to recover, unless, as the defendants claimed, he gave it to them. At the bottom of page 817 and the top of page 818, the jury were told that if the plaintiff accepted the option, either in so many words or by act or conduct from which it was understood by him and Mr. Sherwood that he had accepted, then he had the right there. These instructions were correct; there was evidence of the oral express acceptance of the option by Eastman; also sufficient evidence as to the conduct of the parties, from which the jury were authorized to find an acceptance of the option; and unless a contract or

option provides for acceptance in writing, an oral acceptance is sufficient, or it may be proved by the acts of the parties.

- (6) *Springer v. Cooper*, 11 Ill. App. 267; *Graves v. Smedes*, 37 Ky. 344; *Woodlock v. Meyerstein*, 5 Mo. App. 591; *Souffrain v. McDonald*, 27 Ind. 269; *Smith's Appeal*, 69 Pa. St. 474; *Ives v. Hazard*, 4 R. I. 14, 27. These exceptions are overruled.

- (7) A certain instruction referred to in the 91st exception is substantially as follows: In this part of the charge the jury were told that if they found for the plaintiff, he would be entitled to recover as an element of damages the fair market valuation of the lease at the time he turned it over to the defendants. It is contended that the plaintiff never had the lease and never turned it over to the defendants, and that therefore this instruction was erroneous, as not being based upon the testimony. The criticism is without merit. The plaintiff had accepted the option and might have taken the lease in his own name, and assigned it to the defendants; he was willing to avoid this circuitry, and permitted it to be made direct to the defendants as security for their advances to be made; we find no substantial error in this instruction and as to the portion of it relating to the measure of recovery, we have already dealt with that question at length. The exception is overruled.

A certain instruction referred to in the 92nd exception, is substantially as follows: In this part of the charge the jury were told that if the plaintiff had the lease and it was his property and he turned it over to the defendants upon their promise to do certain acts and they failed to carry out those acts and had got that property, then he was entitled to its fair market value at the time he turned it over to them. This exception is substantially the same as the one last considered, is based upon the same grounds, and is overruled for the same reasons.

Certain instructions referred to in the 93d, 94th and 95th exceptions, are substantially as follows: In these parts of the charge the jury were told that if the plaintiff had an accepted

(8) option that was of value, as the defendants had set up that it was a gift to them, the burden was upon them to establish their position in that respect, and to satisfy the minds of the jury by a fair preponderance of the evidence that it was a gift; and that therefore on the second issue submitted for a special finding the burden of proof was upon the defendants. We find no error in these instructions. The evidence on the part of the plaintiff was that he had an accepted option which was of value, and that he had permitted the lease called for thereunder to be made direct to the defendants in pursuance of certain agreements on their part; the defendants denied that they made any agreements with him and set up that he had given them the option without any undertaking on their part, relying upon their generosity, etc. They thereby assumed the burden of proving the gift in accordance with the usual rule, that "he who alleges a gift has the burden of proving the same." *Wheeler v. Glasgow*, 97 Ala. 700, 701; *Bunker v. Tufts*, 55 Me. 182, 189; *Wilson v. Wilson*, 99 Ia. 688, 692; *Matter of Rogers*, 10 App. Div. (N. Y.) 593, 595; *Doty v. Willson*, 47 N. Y. 585; *Walker v. Welsh*, 11 N. E. 727, 728. These exceptions are overruled.

We deem it unnecessary to further consider in detail the exceptions relating to the instructions given to the jury; we have examined them in detail and have considered the briefs of counsel in relation thereto, and find that there was no prejudicial error in any of them; in view of the principles of law hereinbefore set forth, the charge taken as a whole properly set forth the principles appropriate for the guidance of the jury.

We have also examined in detail the special requests for rulings and instructions which were preferred on behalf of the defendants and refused by the trial judge; they are based upon erroneous views of the effect of the testimony, and of the rules of pleading and of damages, which we have fully discussed in the earlier part of this opinion; and we do not find it necessary or useful to discuss them further.

It remains only to discuss certain exceptions taken to the admission or rejection of testimony during the trial, which are specially referred to in the defendants' brief.

- (9) Exceptions 6 and 8 (pages 29 and 40). These were exceptions to the introduction of evidence of things done by the plaintiff at the request of the defendant Dunn, at a time when he had told the plaintiff that he and O'Connor were having nothing to do with each other. Defendants contend that these things could not on any view be charged against O'Connor, but if anybody should pay for them, it should be Dunn individually. But it does not appear that at this time the breach between Dunn and O'Connor was known to the plaintiff to be irreconcilable; and it does appear that what the plaintiff says he did was in an endeavor to assist Dunn at his request in "fixing it up" between the parties so that they could go on. It is evident that the defendants had joint interests analogous to that of partners in the tenancy and option of purchase under the lease, and in the construction of the building; and it appears that each of them had at times in the absence of the other made suggestions to the plaintiff as to what they wished him to do for the common interest. We think that each of the defendants is to be deemed the agent of the other in the matters of their common interest, and that the evidence was properly admitted for what it was worth, to show the relations of the parties and that the plaintiff was acting in good faith in the endeavor to carry out his contract with the defendants. We find no error in such admission and these exceptions are overruled.

Exception 9 (page 46). This was an exception to the admission in evidence of a copy of a letter which the plaintiff testified he wrote to each of the defendants and sent to them by registered mail. It was objected to on two grounds—first, because it was not the best evidence and no notice had been given to the defendants to produce the original, and second, because it was written by the plaintiff himself and had no relevancy except as proof of the truth of a claim made

(10) by him in it; in other words, because it was manufactured testimony. We are of the opinion that the letter was properly admitted; it was a duplicate carbon copy without erasure or alteration of a letter proved to have been sent by registered mail to each of the defendants, and appears upon its face to be only a notice to them that the plaintiff would be obliged to resort to law for the protection of his rights. It does not purport to set forth the terms of any contract between the parties and cannot be regarded as self-serving. Nor, in view of the fact that the letter was a mere notice, intended to ascertain definitely if possible whether the defendants would carry out their agreements with the plaintiff without in any way stating what those agreements were, do we think it was necessary that the defendants be notified to produce the original; it seems to us to come within the exception to the rule regarding secondary evidence, to the effect that a notice of claim may be proved by parol or by duplicate and the original need not be required. 25 Am. & Eng. Ency. of Law (25 ed.) p. 171; *Eagle Bank v. Chapin*, 3 Pick. 180; *Penn. &c. R. Co. v. Braxton*, 34 Fla. 479. From the record it appears that the letter was dated March 28, 1909. The lease was dated May 1, 1908. The building should have been erected under the terms of the lease by May 1, 1909. The writ issued April 29, 1909. To avoid a technical objection that defendants were not yet in default under their agreement, the letters to each of the defendants, together with their subsequent admissions that they intended to do nothing, were introduced by plaintiff to rebut any contention that the action was premature. There is evidence that the letter was recognized and referred to by both Dunn and O'Connor in a subsequent conversation with the plaintiff, and it was admissible to connect and explain such admissions and conversations. *Dutton v. Woodman*, 9 Cush. 255, 262. This exception is overruled.

Exception 11 (page 51). This exception was to the admission of evidence of what the defendant O'Connor said during a conversation with the plaintiff, when the possibility of a

- settlement was being discussed between them, after this action was brought, to the effect that, if the plaintiff brought
- (11) him into court, there wouldn't be a chance in the world for the plaintiff, as Fahey, Dunn and O'Connor had rehearsed their story over and over, and he himself would swear the court house out, if necessary. That any such statement was made was positively denied by O'Connor. The question covered by this exception was objected to solely on the ground that it was leading. The question was not leading; it did not suggest what answer was expected from the witness, and even if it were, the propriety of it was in the discretion of the court. The answer, however, disclosed that its admission was proper as a matter of public policy, if for no other reason. The statement made by the defendant O'Connor was proper testimony also, as affecting his veracity. We find no error in its admission and the exception is overruled.
- (12) Exception 12 (pages 108, 109). This was to the refusal of the court to allow the defendants' counsel on cross-examination to ask the plaintiff why he didn't accept the option before meeting the defendants, if he had made up his mind to accept it, anyway. As suggested by the court, if the plaintiff exercised his option before it expired he was within his rights. Whatever motive he may have had for delay, or whatever reason he may have had for not accepting the option, before he met the defendants, or the entire absence of either motives or reasons, either way, within the time provided in the option was wholly immaterial. This exception is overruled.
- (13) Exceptions 23, 24, 25, 26 and 27 (pages 197, 201, 204, 210, 211). These were all exceptions to the introduction of testimony of a real estate broker, who qualified as an expert, as to the value of the option in 1908, as to the value of the property in April or May of that year, and as to the rate at which it had increased in value during the ten years preceding the trial, and the reasons for such increase. The testimony was properly admitted both as showing the familiarity of the witness with the property in question and with other

surrounding property, as a part of his qualification as an expert, and was also admissible as showing the value of the option of which the plaintiff allowed the defendants to avail themselves as a part of the consideration for the agreement between the parties. The defendants' objection is principally based upon erroneous views as to the measure of damages, which we have already fully discussed. These exceptions are overruled.

Exceptions 31 and 34 (pages 255–272). This was to the ruling of the court allowing Mr. Richard A. Hurley to testify as an expert to the value of the property, its probable rate of increase in value and the value of the option. Defendants admit that the question whether any witness can testify as an expert is always largely in the discretion of the trial justice, but contend that Mr. Hurley showed so little personal knowledge of the values at different times of properties near enough to the property in question to be affected by much the same conditions, that he clearly never ought to have been allowed to testify.

The objections urged by the defendants go to the weight of this testimony, rather than to its admissibility. "The competency of persons offered as experts is generally a question to be decided by the trial court. If error is committed in admitting an incompetent person, the cross-examination to which he is subjected may generally be relied upon to show his ignorance and neutralize the force of his opinions. Unless the ruling of the court is palpably and grossly wrong, it will not be reversed by the reviewing tribunal. Rogers on Expert Testimony, §§ 22, 23; Lawson on Expert Evidence, 276, 468; Gillet on Indirect Evidence, § 209; *Howard v. Providence*, 6 R. I. 514; *Sarle v. Arnold*, 7 R. I. 586." *Ennis v. Little*, 25 R. I. 342. These exceptions are overruled.

Exceptions 32 and 33 (pages 258, 263). These were to the admission of testimony by Mr. Hurley similar to that already discussed under Exs. 23–27, above, and the exceptions are overruled for the same reasons.

Exceptions 37, 38 and 39 (pages 289 second, 290, 291). These were taken to the refusal of the trial justice to permit Mr. Hurley to answer certain questions asked him on cross-examination by the defendants' counsel. He was asked what a man could get for the option from Mr. Sherwood on the last day of it, if he was not going to exercise it himself. The court refused to allow this on the ground that the question at issue in the case was not what the plaintiff could get (15) for the option. The witness was also asked if a great deal does not depend on whether a man has means to exercise an option himself or has to raise funds from some one else. The exclusion of these questions was proper; they were wholly immaterial. It was shown that he had accepted the option and had made use of it as a basis of an agreement with the defendants. Whether he could have got anything for it from other parties, or whether he could have exercised it himself without aid from other parties was not in issue, since he had exercised it with the aid of the defendants and for their mutual benefit and made use of it as a basis for an agreement whereby all of the parties might have been benefited had the defendants in good faith carried out their agreement. These exceptions are overruled.

Exceptions 40 and 41 (pages 293, 294, 297). These were taken to testimony given by William H. Herrick as a real estate expert as to the value of the option in April, 1908, and as to his opinion at the time of the trial of the rate of increase in the value of this property for ten years following April, 1908. The defendants' objections were based upon the same grounds as in previous exceptions to testimony of other experts, and these exceptions are overruled for the same reasons.

Exceptions 43 and 44 (pages 300, 312). These were taken to the admission of testimony by Mr. Herrick that shortly after the lease was executed Mr. Dunn said that his price for it was \$30,000. The testimony related to a conversation shortly after the acquiring of the property by the defendants under the lease from the owner Sherwood, and was a proper

- 16) admission against interest, as fixing in the estimation of the defendant Dunn, who was largely interested in real estate, as an investor and builder, the value of the lease which the defendants obtained under the option; it was also proper testimony, taken in connection with other testimony in the record, particularly the testimony of Dunn himself, as to other offers made by him to sell the lease to explain the conduct of the defendants in their treatment of the plaintiff after they had thus acquired all his rights and had gotten this property into their own hands. We think this testimony was properly admitted, and these exceptions are overruled.

Exception 45 (page 320). This was to the refusal of the court to allow the witness to tell on cross-examination whether he thought a two-days' option as valuable as one for twenty-five days. The question was immaterial for reasons already discussed (Exs. 37-39) and the exception is overruled for the same reasons.

Exception 47 (page 331). This was to the admission of a paper containing figures given by Mr. Dunn to a real estate agent to be used in interesting a prospective purchaser of the leasehold interest not long before the time of the trial. This evidence was properly admitted for the same reasons already given (Exs. 43-44) and this exception is overruled.

Exception 52 (page 414). This was taken to the ruling of the court compelling Mr. Dunn to tell how much he asked for the property when The Shepard Company was trying to buy it. This ruling was correct for the reasons already given, and this exception is overruled.

Exceptions 53, 54, 55 and 56 (pages 436, 437, 438, 439). These were taken to repeated refusals by the court to allow questions asked on redirect examination of Mr. Dunn to clear up a certain confusion in his testimony caused by the fact that he did not remember what day of the week April 21, 1908, was and thought it was Monday. Questions were asked for the purpose of refreshing his recollection on this point, and a calendar for the year 1908 was offered to him for the same purpose. An examination of the testimony does

not show that the matter was of sufficient importance to warrant the further continuance of this line of questions, which would probably have confused the jury. We find no error in these refusals, and think, the court properly exercised its discretion. These exceptions are overruled.

Exception 57 (page 443). This was taken to the refusal of the court to permit the defendants' counsel to ask Mr. Sherwood whether the plaintiff paid anything for the option.

- (17) The question was entirely immaterial. The value of the option to the parties in this suit was not predicated upon what the plaintiff paid for it or whether he paid anything for it or not. The question was properly excluded and the exception is overruled.

- Exceptions 59 and 60 (pages 445, 447, 448). These were taken to the refusal of the court to allow the defendants to prove by Mr. Sherwood that he had been trying to sell his property for some time for less than \$42,000 and had not succeeded, and that, shortly before he gave the option to the plaintiff, he had had an option out for some weeks by which
- (18) the property could be bought for \$40,000, and that it was allowed to expire without being used. These matters were quite immaterial; if proved they would simply show that Mr. Sherwood had not been fortunate enough to find a purchaser; the fact that he gave an option of immediate purchase to the plaintiff at \$42,000, of purchase in two years at \$45,000, and in ten years at \$50,000, under the option proved in this case, which option was accepted, and of which the defendants availed themselves, was all the evidence necessary as to the price at which Mr. Sherwood was willing to sell. It made no difference at what price he had previously offered to sell, or that he had not been successful. These exceptions are overruled.

Exception 61 (pages 450-453). This was to the refusal of the court to allow Mr. Sherwood to tell what occurred when the plaintiff and Mr. Fahey came to his office on the Saturday before the option would expire and asked for an extension of time. In view of the fact that the option was not allowed to expire, but was finally accepted and exercised,

it was quite immaterial what was said about an extension. This exception is overruled.

Exceptions 63 and 64 (page 469). These were to the refusal of the court to allow the defendants' counsel to ask Mr. Sherwood what his reason was for holding the option open for one day after Monday, April 20. The question was quite immaterial. It did not make any difference why Sherwood held the option open and allowed these parties to avail themselves of it, so long as he was willing to do it. These exceptions are overruled.

Exception 66 (page 629). This was to the refusal of the court to allow Mr. O'Donahue to state to the jury the differences that in his opinion were material between the contract and the lease. The question was properly excluded; first because it left it to the witness to say what variations seemed to him to be material, instead of having the differences, if any, pointed out, and leaving the court to instruct the jury as to whether they were material or not, for the jury to consider. Furthermore, an examination and comparison of the lease with the option shows that there is no substantial variation of terms between the two, the only additional provision in the lease being the agreement by the lessor in case of purchase to accept 75 per cent. of the purchase price on mortgage, there being no express stipulation in the option as to the terms of payment in case of purchase. We do not regard this as such a material variation as to make it necessary that it should have been called to the attention of the jury. This exception is overruled.

(19) Exception 70 (page 699). This was to the refusal of the court to permit Mr. Sherwood to testify whether he would have allowed the plaintiff to accept the option, if he had not had a satisfactory financial backer. As it was provided in the option that the plaintiff should give bond with sureties satisfactory to Sherwood to build the building, it is evident that it was contemplated that Eastman should have a "satisfactory financial backer," and he testified that he already had one before he met the defendants. Under the circumstances, as they transpired, it turned out that the

plaintiff did not need to give the bond, since the lease was made directly to the defendants whose responsibility was satisfactory to Sherwood. It was quite immaterial what Sherwood would have done under other circumstances. This exception is overruled.

(20) Exceptions 69 and 72 (pages 692, 706). These were taken to the exclusion of questions asked by the defendants' counsel of real estate men, who were testifying as experts in their behalf, as to the degree of certainty with which real estate agents could estimate the probable rate of increase in value of property like that involved in this case for ten years in the future. These questions were objected to on the ground that they called for opinions from the witnesses as to the value of the testimony of other experts who had testified in the case, and were rightly excluded on that ground. The defendants' witnesses were allowed full latitude in testifying as to the uncertainty which necessarily exists in the matter of the probable increase of value in real estate within a given period. These exceptions are overruled.

Exception 74 (page 711). This was to the exclusion of a question asked as to what a man with such an option as the plaintiff's could expect to get for it. The question as framed included statements of fact not in accord with the testimony and was rightly excluded. This exception is overruled.

Exception 75 (page 715). This was to certain statements made by the trial justice to the defendants' counsel in the presence and hearing of the jury, and which, the defendants claim, tended unfairly to prejudice the jury against them. An examination of the transcript at this point does not convince us that the court, in its colloquy with counsel, went beyond proper limits in discussion of the effect of certain testimony in the case, and its terse statement of the conflicting claims of the parties. We find no error, and this exception is overruled.

Exception 76 (pages 711-716). This raised the question, which has been already discussed, as to whether the financial ability of the plaintiff to handle the proposition contained in the option himself was a material element in its value.

We think, under all the circumstances of this case, that the rulings of the trial judge were correct. It is quite evident that the plaintiff supposed that, when he made his agreement with the defendants, he had put himself in a position to accept the option and to so handle it as to make it of ultimate value to all parties concerned. We find no error in the rulings and this exception is overruled.

- (21) Exception 77 (page 743). This was to the refusal of the court to allow the defendants' counsel to ask one of the real estate experts whether in his twenty-three years of experience he had ever known an option on real estate to be sold for any considerable sum. It was rightly excluded; if answered in the negative, it would have thrown no light upon the value of the option here in question; if answered in the affirmative, it would have opened a field of inquiry into sales of real estate options in general, with all their attendant facts and circumstances, wherever situate, known to the witness, and would doubtless have resulted only in confusion to the jury and undue extension of the record. This exception is overruled.

All of the defendants' exceptions are overruled; the case is remitted to the Superior Court, with direction to enter judgment for the plaintiff upon the verdict.

John W. Hogan, Philip S. Knauer, for plaintiff.

Gardner, Pirce & Thornley, for defendants.

William W. Moss, of counsel.

ALBERT H. MCAUSLAN *et al.*, vs. GEORGE R. MCAUSLAN *et al.*

JULY 6, 1912.

PRESENT: Johnson, Parkhurst and Sweetland, JJ.

(1) *Error and Appeal. Appeals in Equity. Final Decrees.*

A final decree in equity is not necessarily the last order in the case.

A decree to be final must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance on appeal, the court below would have nothing to do but to execute the decree it had already rendered.

There is an exception to this rule, where to enforce it would result in possible hardship and injury, and in such cases decrees strictly interlocutory are held to possess such an element of finality as to bring them within the terms of the statute.

(2) *Appeal and Error. Appeals in Equity. From Interlocutory Decrees.*

Besides the appeals from interlocutory decrees provided for by statute, cases may occur of decrees in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review, and must be held for this reason to have such elements of finality as to permit an immediate appeal.

(3) *Error and Appeal. Appeals in Equity. From Interlocutory Decrees. Several Defendants.*

Another class of decrees offers a modification of the general rule. Of this class is a decree made as to one of several defendants whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant. Such decree is final as to him, although the cause may be still pending in the court as to the rest.

(4) *Error and Appeal. Appeals in Equity. Final Decrees. Accounting.*

Upon a bill in equity seeking the removal of a trustee and an accounting, which is sent to a master to take the account and to report upon the removal of the trustee, the decree of the Superior Court confirming the master's report is not the final decree in the cause, as more is required to give the complainant the relief desired.

(5) *Error and Appeal. Appeals in Equity. Final Decrees.*

A final decree in an equity cause is the decree which finally determines the rights of the parties, provides for the relief which the court finds to be necessary, and at most merely requires one or more orders or supplemental decrees for its enforcement.

An appeal from a final decree in equity brings up for review all matters contained in such decree and all previous rulings, orders or decrees made or entered in the cause previous to the entry of such decree; unless such decree or such previous rulings, orders or decrees from the circumstances or the manner in which they have been made or entered, are not reviewable, and said decree or such previous rulings, orders or decrees are not reviewable unless it is specifically stated in the reasons of appeal that objection is made to such decree or previous rulings, orders or decrees.

(6) *Error and Appeal. Appeals in Equity. Supplemental Decree.*

A supplemental decree or order for the execution of the final decree, as above defined, is also so far a final decree as to support an appeal, but an appeal from such supplemental decree will bring up for review only such matters

as are involved in the decree itself or matters arising subsequent to the entry of the final decree, but it cannot bring up any alleged error in the final decree itself or any matters arising in the cause previous to the entry of the final decree, and only the alleged errors stated in the reasons of appeal.

(7) *Error and Appeal. Appeals in Equity. Trusts. Removal of Trustee. Accounting.*

Upon a bill in equity seeking the removal of a trustee and an accounting, where it was clear upon the pleadings that complainants were entitled to the account, and there were no issues raised by the pleadings which required determination before a reference to a master, the court properly referred the cause to a master after bill, answer and replication filed, and the question of the removal of the trustee was involved in the question of the nature and propriety of his dealings with the trust estate and the master was properly directed to report his conclusions upon the question of removal.

(8) *Error and Appeal. Appeals in Equity. Accounting. Trusts. Framing of Issues.*

Where a cause is referred to a master to state an account and to report upon the removal of a trustee, the decree of reference being entered after notice and hearing and the scope of the reference being particularly defined in the decree, there is no force in the objection that such reference preceded the framing of issues.

(9) *Error and Appeal. Appeals in Equity. Trusts. Accounting. Masters. Delegation of Authority of Court.*

Where upon a bill in equity seeking the removal of trustee and an accounting the cause is referred to a master under Gen. Laws, 1909, cap. 289, § 17, to hear testimony and report it and his findings to the court, there is no delegation to the master of the court's power of decision in the cause.

(10) *Error and Appeal. Appeals in Equity. Masters. Due Process of Law. Trusts.*

Upon a bill in equity seeking the removal of a trustee and an accounting, the reference of the cause to a master under Gen. Laws, 1909, cap. 289, § 17, to hear testimony and report it and his findings to the court, is not obnoxious to the fourteenth amendment to Cons. U. S., as not having been in accordance with "due process of law."

(11) *Error and Appeal. Appeals in Equity. Report of Master. Objections to Report. Exceptions.*

As under the practice in equity exceptions cannot be taken to the report of a master, where no objections were taken to such report before the master, under the statute the findings of the master became conclusive on the parties, and an appeal from the decree entered in the cause does not have the effect of opening that matter before the appellate court.

(12) *Appeals from Report of Master.*

If the Superior Court should not have reversed the findings of a master in the absence of exceptions to his report, the Supreme Court, upon appeal, will not consider the propriety of his findings nor reverse nor modify them.

BILL IN EQUITY. Heard on appeal of a respondent, and dismissed.

SWEETLAND, J. This is an equity appeal. The bill is brought by certain *cestuis que trust*, beneficiaries under the trusts contained in the will of John McAuslan, and the assignee of certain interests in said estate, against the trustees named in said will and the assignee under the mortgage of the interest of certain other beneficiaries. The bill asks for the removal of George R. McAuslan, one of said trustees; that an account be taken of the trust property and the application thereof by said trustees; and for a decree ordering said trustees to pay to said trust estate what shall appear to be due from them on such account. The bill alleges among other things; that said George R. McAuslan has assumed the active management of said trusts and practically has been the sole trustee; that said trusts have been mismanaged; that said George R. McAuslan is incompetent to perform the duties of trustee; that by reason of certain investments of the trust estate made by the trustees, as specified in the bill, the trust estate has lost large sums of money; that the trustees have failed to keep proper accounts, do not act in harmony, have become personally indebted to the trust estate in large amounts, and have been adjudged in contempt of court for failure to make payments of money from the trust estate in accordance with the decree of the Superior Court.

Of these respondents, other than the said trustees, one joins in the prayer of the bill, another has permitted the bill to be taken as confessed against him and the others, as minors, have submitted their interests to the care of the court. The respondent trustee, Amelia B. McAuslan, in her answer admits all the essential allegations of the bill and joins in the prayer for a receiver. The other respondent trustee, George R. McAuslan, in his answer, among other things, admits that the trustees have made losses in the management of the trust estate, but sets out facts which he

claims excuse him from blame. After replication filed, on motion of the complainants and after notice to the respondents and hearing, the Superior Court by decree entered April 2, 1910, referred the cause to a master "to examine and state the accounts of the executors and trustees with the estate of the said John McAuslan and report to the court" a number of particulars regarding the amount of the estate at the death of John McAuslan, the dealings of the trustees with the principal of the estate, the amount of the income received from the estate and the disposition of said income by the trustees. The master by this decree was also directed to report to the court whether George R. McAuslan should or should not be removed as trustee of said estate. After a number of hearings before the master, of which all the parties received due notice, the master prepared a draft of his report and all the parties were notified by the master that said draft report was on file in his office for the inspection of the parties and their solicitors, and that at a certain day and hour named he would hear objections to said report. No objections were made by any of the parties and the master filed his report unsealed in the Superior Court. On motion, of which the parties had due notice, the Superior Court by decree entered on March 4, 1911, confirmed said report. By said report it appears that the master has taken testimony as to all the questions referred to him and has endeavored by his consideration of such testimony and his conclusions thereon, to give to the court the assistance which it had required. Thereafter the Superior Court by decree entered April 15, 1911, removed said George R. McAuslan from being trustee as aforesaid; fixed the amount due from said trustees to said trust estate; ordered the said trustees to pay the sum so found to be due to the receiver of said trust estate; made said sum so found to be due a lien on the interests of said trustees in the trust estate; and provided that if said sum so found to be due was not paid to said receiver within thirty days thereafter the interests of the said trustees in the trust estate should be liable to be applied toward making

good to the trust estate said sum or such part thereof as might then remain unpaid.

From this decree the said George R. McAuslan has appealed. At the outset of the consideration of this appeal we are met by the objection of one of the respondents, whose interest in the present matter is similar to that of the complainants, that the reasons of appeal stated by the respondent, George R. McAuslan, cannot be considered as they are objections to acts of the Superior Court preceding the decree confirming the master's report; that the decree of April 15, 1911, from which this appeal is taken is merely auxiliary to the decree confirming the master's report, which is the final decree; that an appeal from the decree of April 15, 1911, can bring in question before this court only the proceeding in the Superior Court subsequent to the decree confirming the master's report, and cannot interfere with that decree; that the respondent, George R. McAuslan, could have raised the objections stated in his reasons of appeal only upon an appeal from the decree confirming the master's report.

This brings before us the question of what is the final decree in equity causes intended by our statute as the appealable decree in a cause. Previous to the passage of the Court and Practice Act, equity appeals were unknown in our practice, since the period from 1867 to 1871, when appeals to the full court were permitted from both the final and interlocutory decrees made by a single justice of the Supreme Court.

Under our present statute an appeal may be taken from the final decree of the Superior Court in an equity cause, and from the final decree alone, with these exceptions: an appeal may be taken from an interlocutory decree granting or continuing an injunction, appointing a receiver or ordering a sale of real or personal property. *Hemenway v. Hemenway*, 28 R. I. 85.

What constitutes a final decree is a question not easily determined in every case. The decisions of the courts are far from uniform upon the subject. As was said by the

court in *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536: "Probably no question of equity practice has been the subject of more frequent decision in this court than the finality of decrees." The statutes of some of the states provide for an appeal from both final and interlocutory decrees and the question before the courts in some reported cases has been whether a certain decree was an appealable one, not whether it was interlocutory or final. By the terms of the statutes of some states an appeal will lie in chancery from any decree or order "adjudicating the principles of the cause." In some jurisdictions where the statutes permit appeals from final decrees alone, decrees which were strictly and technically interlocutory have been held to be final when irreparable injury might result to a party if he was compelled to await the final outcome of the cause in the lower court before he could obtain a review in the appellate tribunal. For these and other reasons there is much confusion in the reports as to what constitutes a final decree for the purpose of appeal. Our statute regarding the appealability of decrees in equity is similar to the United States statute. It is in the federal courts that we find the subject, now under consideration, most frequently treated and the practice most consistent and reasonable.

- We have frequently said in regard to the removal of cases at law to this court for review that the intent of the statute is that exceptions in such cases shall not be certified to this court until after all matters arising in the cause in the Superior Court have been determined. We see in the statute the same general intent with regard to appeals in equity so far as the distinctive character of equity procedure
- (1) makes such practice reasonable and expedient. From the nature of proceedings in equity it must be held that the final decree is not necessarily the last order in the case. On the other hand a decree should not be considered final, although it purports to declare the rights of the parties and to regulate all "actions that may be expected to be taken in the future disposition of the case" such decrees "have no efficacy

until put into the form of a judgment that is capable of being carried into execution." *Patterson v. Hopkins*, 23 Mich. 541.

A decree which directed a trustee to sell mortgaged property as the court might afterwards direct and referred the cause to a master to report the prior liens was held not to be a final decree because it was not determined what the order of sale should contain nor what should be the form of advertisement therefor. *Parsons v. Robinson*, 122 U. S. 112.

With the modification which we shall consider later, we adopt as a reasonable definition of a final decree in equity, under our statute, the one approved in *Grant v. Phoenix Ins. Co.*, 106 U. S. 429: "The rule is well settled that a decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered." See, also, *Dainese v. Kendall*, 119 U. S. 53; *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases therein cited. In its essential particulars this general rule has been followed by the courts of a number of the states: "A final decree is one which determines and disposes of the whole merits of the cause before the court or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination; so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision." *Teaff v. Hewitt*, 1 Ohio St. 511. "According to the uniform decisions of this court, a decree which disposes of the whole subject gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final." *Ryan's Adm'r. v. McLeod*, 32 Gratt. 367. "Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not

as final, but interlocutory." *Rawlings' Ex'r v. Rawlings*, 75 Va. 76. "A decree never can be said to be final where it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master." *Johnson v. Everett*, 9 Paige 636. "A decree is final which provides for all the contingencies which may arise and leaves no necessity for any further order of the court to give all the parties the entire benefit of the decision." *Gerrish v. Black*, 109 Mass. 474.

The strict observance of this general rule would in some instances result in such possible hardship and injury that appellate courts in such case have taken cognizance of appeals from decrees, which were technically interlocutory in their character, before the merits of the cause had been determined in the court below. These cases must be considered as representing a modification of the ordinary rule. As was said by the court in *Dufour v. Lang*, 54 Fed. 913: "In the progress of an equity cause, orders and decrees may be made which so affect the parties or the property involved in the suit as to require that such order or decree, to be reviewed at all by an appellate court with effect, should be appealed promptly, and not await the full disposition of the whole suit; and whenever this is the case the decree is held to possess such an element of finality as to bring it within the terms of the statute limiting the right to appeal only from final decrees."

In *Forgay v. Conrad*, 6 How. 201, which is one of this class of cases, the court treats of the necessity for this modification of the ordinary rule as follows: "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be

delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right." This case of *Forgay v. Conrad* was an appeal from a decree of the Circuit Court adjudging that certain deeds should be set aside as fraudulent and void; ordering that certain lands and slaves should be delivered up to the complainant, that one of the defendants should pay a certain sum of money to the complainant; and that the complainant should have execution for these several matters, although the bill was retained in court for other purposes. The Supreme Court in holding that this decree authorized an appeal, said: "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt before they can have an opportunity of being heard in this court in defence of their rights."

This case and others of like character are frequently cited as authorities for the extension of the ordinary rule in regard to appealable final decrees in equity. The case has been regarded by the United States Supreme Court, itself, as an exception to that rule. In *Barnard v. Gibson*, 7 How. 650, it was held that *Forgay v. Conrad*, 6 How. 201, is supposed to be a departure from the uniform course of decision in the United States Supreme Court. In commenting on *Forgay v. Conrad*, the court held, in *Craighead v. Wilson*, 18 How. 199, that although it was stated that the part of the decree above recited was final the principal

ground on which the appeal was sustained was the peculiar circumstances of the case.

- In certain cases our statute has guarded against the possibility of injury arising from restricting appeals in all instances to final decrees, in the technical sense, by providing for appeals from interlocutory decrees granting or continuing injunctions, appointing receivers or ordering a sale of property. Besides those provided for in the statute other instances may present themselves of decrees, in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review and must be held for this reason to have such elements of finality as to permit an immediate appeal.
- (2)

- There is another class of decrees which is to a certain extent a modification of the general rule. Of this class is a decree made as to one of several defendants, whose interests
- (3) are not at all connected with each other, with a direction for the payment of costs as to that defendant. Such decree is final as to him, although the cause may be still pending in the court, as to the rest. *Royall's Administrator v. Johnson*, 1 Rand. 421; *Dickenson v. Codwise*, 11 Paige, 189.

Of this nature was the decree considered in *Doty v. Oriental Print Works Company*, 28 R. I. 372. In that case the court heard and determined an appeal from the decree denying and dismissing the petition of one Tenney for leave to intervene in the above entitled equity cause as a preferred creditor of the respondent.

It cannot be claimed in the case at bar that the decree confirming the master's report is within either of the exceptions to the general rule which we have discussed, and that for such reason it should be considered as a final decree, from which an appeal could and should have been claimed, if the respondent, George R. McAuslan, wished to raise the objections stated in his reasons of appeal. Under the general rule which we have adopted, the decree confirming the master's report is not the final decree in the cause. More was required to give the complainants the relief which they

(4) desired in the cause and which the Superior Court intended to grant, than the entry of a mere auxiliary decree or a decretal order in execution of the decree confirming the master's report.

(5) The final decree in an equity cause is the decree which finally determines the rights of the parties, provides for the relief which the court finds to be necessary that the parties may have the full benefit of the court's determination upon the merits, and at most merely requires one or more orders or supplemental decrees for its enforcement. The modifications which we have considered have been permitted to prevent the consummation of injury beyond redress during the progress of the cause, or because there has been a final determination of the cause as to one or more, but not as to all the parties. These modifications have been permitted for the protection of the party aggrieved by the decree, and for that reason alone. They should be considered as exceptions to the general rule and if so considered they will cause no confusion in practice. For the court at times to recognize further variations, suggested in the ingenious and sometimes persuasive arguments of counsel based upon other considerations as to the finality of particular decrees, would be to throw our practice with regard to appeals in equity back into confusion, to place solicitors in uncertainty and in some instances to cause injury to litigants. For if a party aggrieved by a decree may appeal, we think the weight of authority and regularity of procedure would require that he must appeal or lose his right to have the objectionable decree reviewed by this court. We have spoken of the uncertainty which sometimes exists in the reported cases as to whether the particular decrees under consideration have been interlocutory or final. If the rules which we have adopted as to appealable decrees are not strictly observed upon the entry of every decree with regard to the finality of which there may be question, the solicitor of the aggrieved party will be confronted with the uncertainty, as to whether he should delay the progress of the cause and commence the prosecu-

tion of an expensive and perhaps ineffective appeal, or should risk his client's right ever to object to the decree. An appeal from a final decree in equity, as we have defined it, brings before this court for review all matters contained in such decree and all previous rulings, orders or decrees made or entered in the cause previous to the entry of such decree; unless such decree or such previous rulings, orders or decrees, from the circumstances or the manner in which they have been made or entered, are not reviewable, as a decree entered by consent, a decree confirming a master's report to which no exception has been taken, and others; and said decree or such previous rulings, orders or decrees, are not reviewable unless it is specifically stated in the reasons of appeal that objection is made to such decree or previous rulings, orders or decrees.

- (6) A supplemental decree or order for the execution of the final decree, as we have defined it, is also so far a final order or decree as to support an appeal; but an appeal from such order or supplemental decree will bring before the court for review only such matters as are involved in the order or decree itself, or matters arising subsequent to the entry of the final decree; but it cannot bring before the court any alleged error contained in the final decree itself or any matters arising in the cause previous to the entry of the final decree; and as is true of all appeals in equity it only brings up for review the alleged errors which are stated in the reasons of appeal.

Cases may be found in which this court has passed upon appeals from decrees which were not final under the rule which we have adopted. They were cases in which either the question was not raised or for other reasons, which it is unnecessary at this time to consider, it was thought advisable to permit an immediate review of the particular decree in question. We adopt the foregoing conclusions, however, as rules applicable to all cases and believe that they will provide a settled and uniform practice in equity appeals.

(7) The appellant states in his reasons of appeal and urges before us that the decree of April 2, 1910, referring the cause to the master to examine and state the accounts of the trustees and report to the court, was improperly and improvidently entered, because the court sent the cause to a master before determining the issues raised by the pleadings and before issues were framed; because the court by such reference delegated to the master its function of determining the merits of the cause; and because the reference was unconstitutional and void as a delegation of judicial power. The appellant also urges that the proceedings following the reference to the master have not been in accordance with "due process of law" guaranteed under the Fourteenth Amendment of the Constitution of the United States.

(8) We are of the opinion that these objections to the action of the Superior Court are without merit. The appellant in his answer admits sufficient of the allegations of the bill to warrant the court in making the reference after bill, answer and replication filed. It was clear upon the pleadings that the complainants were entitled to have an account taken. The question of the removal of the appellant as trustee was involved in the question of the nature and the propriety of the dealings of the appellant with the trust estate. The Superior Court with perfect propriety, under our statutes and the settled practice of equity courts, directed the master, who was to take the account, to report to the court his conclusions upon the question of removal. There were no issues raised by the pleadings which required determination before the court should seek the assistance of the master upon the matters involved in this reference. Nor is there force in the objection that the reference preceded the framing of issues. The decree of reference was entered after notice and hearing and in it the scope of the reference was particularly defined. Section 17, Chapter 289, General Laws, 1909, provides as follows: "The court may, on motion of any party, hear any cause or proceeding in whole or in part on oral testimony, or it may send the pleadings

and any issues therein (to be heard on oral testimony) to a master who, under the direction or rules, general or special, of the court, shall hear and report to the court the evidence and his rulings in such suit or proceeding and his findings on such evidence; and if such rulings or findings be not specifically excepted to within thirty days after the opening of said report (of which opening the clerk of said court shall at once notify in writing all parties or their attorneys of record), they shall be conclusive on all parties, except that for cause shown the time may be extended on motion filed within said thirty days." It cannot properly be said that by the reference the determination of the merits of the cause was delegated to the master. A court of equity can-

(9) not abdicate its functions, but our statute and the established practice in chancery permit the court to refer to a master such matters as were contained in this decree of reference, not for his determination, but that he may hear the testimony and report it and his findings thereon to the court. The master's report may be objected to and be the subject of exception from all parties. It is only after such exceptions as may be taken have been heard and passed upon by the court that the court can avail itself of the information contained in the report. There was no delegation to the master of the court's power of decision in the cause.

No constitutional question under the Fourteenth Amendment of the Federal Constitution is raised by this reference. It was made in accordance with the practice in equity long

(10) established in England and the United States. This court has said in *Carr v. Brown*, 20 R. I. 215: "The words 'due process of law' mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

The appellant also states in his reasons of appeal that the decree of April 15th from which the appeal was taken is against the evidence and the weight thereof. In support of

this the appellant urges that the master's findings were unjust under all the circumstances of the case. It is to be observed that this appellant presented no testimony before the master and gave him no assistance in stating the account between the trustees and the trust estate. The appellant made no objection to the draft of the master's report, submitted to the parties in accordance with the equity rules of the Superior Court; which rules have been approved by this court. Upon the filing of the report in the Superior Court the appellant did not specifically except to the findings of the master, nor unless based upon objections made before the master would such exceptions have been considered if the appellant had attempted to file them. This court has said in *Teoli v. Nardokillo*, 23 R. I. 87: "Under the well-settled practice of this court, as well as the very uniform

- (11) practice of equity courts generally, the rule is very strictly adhered to of not permitting exceptions to be filed when there have been no previous objections taken." Therefore under the statute the master's findings upon the state of the account between the trustees and the trust estate became conclusive on the parties. This appeal does not have the effect of again opening that matter before this court. In accordance with a well recognized principle of appellate procedure, if the Superior Court should not have reversed the findings of the master in the absence of exceptions to his
- (12) report, this court upon appeal will not consider the propriety of the master's findings and will not reverse or modify them.

"But if the situation of the cause was such at the final hearing, that the court below could not, upon the papers then before it and according to the settled course of proceeding, go back for the purpose of looking into the matter of the alleged error in a previous order or decree, it would be a violation of all principle for the appellate court to reverse the final decree, because the court below at the time of making such decree had not done what it had then no power to do. In other words, the final decree cannot be erroneous, so as to justify a reversal of it, upon an appeal from that decree alone,

if at the time it was made the court below had no legal right to make any other, consistently with the justice and equity of the case as then presented for consideration and decision." *Bank of Orange County v. Fink*, 7 Paige, 87.

The appellant also states as one of his reasons of appeal "that said decree is erroneous in that it peremptorily, at the end of thirty days, makes disposition of this respondent's vested and contingent interests in said trust, irrespective of the outcome of any appeal from said decree which this respondent may take." There is no merit in this objection to the decree. The decree was not framed in contemplation of an appeal, but was the final decree which provided for relief. Further, the statute provides that upon compliance with the requirements, therein specified, as to claiming an appeal, all proceedings under the decree appealed from shall be stayed.

The appeal is dismissed. The decree of the Superior Court appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings in accordance with the decree.

Dexter B. Potter, James C. Collins, W. Arthur Countryman, Jr., Everett L. Walling, for complainants.

Bassett & Raymond (Russell W. Richmond, of counsel), for respondent, *George R. McAuslan*.

Eliot G. Parkhurst, Eugene A. Kingman, Edwards & Angell, for respondent, *Edward P. Jastram*.

NEWPORT WATER WORKS vs. JOHN M. TAYLOR, City Treasurer.

JULY 6, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst and Sweetland, JJ.

(1) *Construction of Contracts.*

In the construction of contracts, the intention of the parties must govern when it can be clearly inferred from the terms of the contract and can be fairly carried out consistently with the settled rules of law.

Words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation.

(2) *Contracts. Construction.*

A contract between a city and a water company provided that the company should furnish the city with water for its use for the public buildings and many specified purposes, including "fourteen spring drinking fountains of ordinary capacity and one constantly running fountain on Washington Square," at an agreed price, and that water in addition to what was designated should be allowed at stipulated rates, including among other purposes, "spring fountains of the kind above mentioned at \$25 a year each." Said rates were to continue until the price to be paid by the city should be equal to \$10,000 a year in all, and then the city was to pay only at said last mentioned rate, and all additional or greater use of the water should be free. "Said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said city at its pleasure."

The city council passed a resolution authorizing the erection of three fountains similar to that on Washington Square, and for several years the city paid for their use at the rate of \$100 a year each, in addition to the sum of \$10,000, and after a period of four years during which no payment was made for the fountains, upon claim made therefor by the water company appropriated the amount necessary for the payment of such claim:—

Held, that upon the terms of the contract considered with reference to the situation and circumstances of the parties at the time of its execution and in the light of the construction given to it by the conduct of the parties since it went into operation, only one constantly flowing fountain was contemplated by the contract as included under the maximum price of \$10,000.

(3) *Construction of Contracts.*

In the construction of contracts, general terms are restricted and limited by particular recitals when used in connection with them.

(4) *Construction of Contracts. Acts of Parties.*

Where the construction of an instrument in writing is doubtful, and the parties have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties.

ASSUMPSIT. Certified on agreed statement of facts.

JOHNSON, J. This is an action of assumpsit brought by the plaintiff against the City of Newport to recover at the rate of three hundred dollars for supplying water to three constantly flowing drinking fountains belonging to the city

for and during a certain period. It was originally brought in the District Court where a decision was entered for the defendant and a jury trial was claimed by the plaintiff. The case has been certified to this court by the Superior Court under Gen. Laws, 1909, cap. 298, § 4, on an agreed statement of facts.

The agreed statement of facts is as follows: "In the above entitled cause, the following facts are admitted as proved:

"1. That the Newport Water Works is a corporation created by law and is the successor and assignee of the hereinafter mentioned George H. Norman and that for the purposes of this action, said corporation has all the rights and privileges and is subject to all the liabilities and obligations which the said George H. Norman would have possessed and incurred.

"2. That on the 19th day of January, A. D. 1881, the following proposition was submitted to the qualified electors of the City of Newport and by said electors adopted and approved by a majority of affirmative votes, namely:

" 'Shall the City Council contract with George H. Norman to supply a full and ample quantity of water for the public use of the City, viz:—for all public buildings, hydrants, reservoirs and fountains and for sprinkling streets and flushing sewers, subject to all proper and reasonable restrictions against unnecessary waste, said Norman to furnish, set up and keep in repair, without expense to the City, but to be located by the City Council, as many hydrants, not to exceed the number of two hundred, as shall be required by said City Council, upon the following terms, namely:—at an annual compensation not to exceed the sum of ten thousand dollars, for a term of five years, said contract to carry the right to the City at the option of the City Council at the end of said term of five years, to continue or renew said contract for the remainder of the time of said Norman's exclusive right to lay down and maintain water pipes in the streets of Newport, the annual compensation to remain unchanged,

unless the permanent population of the City shall grow to exceed twenty-five thousand inhabitants, when the City and said Norman shall each appoint one person to determine by arbitration what increased annual compensation shall be paid him:—should said two persons fail to agree thereon, they two to appoint a third, and the decision of the three to be final and binding. Said City to be guaranteed and secured in said contract the right at any time without paying any further compensation, to place, connect and use as many hydrants in excess of said two hundred as the City Council may deem necessary.'

"3. That on the 23rd day of February, A. D. 1881, George H. Norman, now deceased, and who, at that time, was the owner of the Newport Water Works, and of its franchises, entered into a contract with said City of Newport for the supplying said City with water, which contract, a copy of which is hereto annexed as part hereof, was afterwards approved by a vote of the City Council on March 1st, 1881.

"That part of which relating to the question at issue herein provided as follows:—

" 'Now pursuant to the terms of said proposition and by virtue of the said acceptance thereof by said electors, it is hereby agreed between George H. Norman of said Newport, and the said City of Newport, a municipal corporation in the state aforesaid, acting herein by its City Council as follows:—Said Norman shall, for the next five years and after the first day of June, A. D. 1881, continuously supply said City of Newport with a full and ample quantity of fresh water, to the reasonable satisfaction of said City (from his Water Works and the pipes therewith connected laid in said Newport) for all the public uses of said City, from time to time and at all times, including and comprehending water for use in all the public buildings of said City, comprising the City Hall, the Police Station, the Fire Engine Houses, the Public School Houses and all other buildings, for the use of the Fire Department of said City in extinguishing, prevent-

ing and guarding against fire, operating steam fire engines and filling public reservoirs, for sprinkling streets and public places to lay the dust, for flushing sewers and for drinking fountains, and for all other public purposes at an annual compensation which shall never exceed the sum of Ten Thousand Dollars to be paid by said City in equal quarter yearly installments, the first whereof shall be made on the first day of September, A. D. 1881.

“ ‘And the said Norman shall begin to furnish and supply said water on the said first day of June next, at the rate or price of Seven Thousand Eight Hundred and Ten Dollars per annum, payable quarterly as aforesaid, in the buildings and through the hydrants and fountains and at the price or upon the apportionment here presently set forth, to wit: Water for Fourteen Spring Drinking Fountains of ordinary capacity, and one constantly running or flowing fountain on Washington Square, and for sprinkling streets and flushing sewers, say \$1,800.

“ ‘Water and the right to have hydrants, fountains, faucets, water-closets and other means, conveniences and facilities for using water, for public purposes as aforesaid, in addition to what are designated or enumerated in the statement or schedule aforesaid, shall be granted and allowed to said City from time to time by said Norman, whenever and wheresoever said City may ask for the same, at these rates, that is to say:

“ ‘Spring fountains of the kind above mentioned at \$25.00 a year each.

“ ‘Hydrants also of the kind above mentioned at \$35.00 a year each.

“ ‘Steam Fire Engine Houses, as above mentioned, at \$50.00 a year each.

“ ‘Hand Fire Engine Houses, as above mentioned, at \$10.00 a year each.

“ ‘School Houses, as above mentioned, at \$20.00 a year each.

“ ‘And whenever the price to be paid by said City for such work and the privileges and means of using the same at the rates aforesaid shall be equal to or exceed the rate of \$10,000 a year in all, then said City shall pay only at that last mentioned rate of Ten Thousand Dollars a year, and all additional or greater use and privilege and means of using said water by the City under this contract shall be free of charge, it being the intent hereof and of the parties hereto that said City may always have as much water as it may need or desire and never pay more than Ten Thousand Dollars therefor in any year, unless upon and after the increase of population hereinafter mentioned.

“ ‘Said fountain on Washington Square, shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said City at its pleasure, and the water furnished hereunder for fountains and buildings shall be good, wholesome drinking water.’

“ A copy of which said contract is hereto attached and marked ‘Exhibit A.’

“4. That on the 5th day of May, 1885, after oral negotiation with the Newport Water Works, the City Council of said City of Newport passed a resolution authorizing the erection of three Jenckes Fountains similar to that on Washington Square and approving the payment of the proportional part of Three hundred (\$300) Dollars for the balance of the year to December 31, 1885, for the use of water, a copy of which said resolution is hereto annexed and marked ‘Exhibit B;’ that in pursuance of said resolution the said three Jenckes Fountains were erected in various parts of said City of Newport and thereupon the said City Council appropriated and ordered paid the sum of money necessary to erect said fountains and also the proportional part of the sum of three hundred dollars for supplying said fountains with water for the remainder of the municipal year.

“5. That said three Jenckes Fountains so erected were similar to the ‘constantly running or flowing fountain’ on

Washington Square, mentioned in said contract of February 23, 1881.

"6. That on the 26th day of May A. D. 1886, the City Council passed a resolution, continuing the said contract made with George H. Norman and dated February 23rd, A. D. 1881, and said contract was continued and is now in force, a copy of which said resolution is hereto attached and marked 'Exhibit C.'

"7. That after the erection of said three fountains, the City of Newport paid to the Newport Water Works for supplying water to these three Jenckes Fountains, the sum of Three Hundred (\$300) Dollars a year in addition to the sum of Ten Thousand (\$10,000.) Dollars, which the aforementioned contract of February 23rd, A. D. 1881, had fixed as the maximum price for supplying water for one year as called for in said contract, and that said City of Newport continued to pay to the said Newport Water Works, for supplying water to said three Jencks Fountains, the sum of Three Hundred (\$300) Dollars, annually up to the year 1892.

"8. That in the year 1892, the said City refused to pay said sum of Three Hundred (\$300) Dollars per year to the Newport Water Works, as aforesaid, and said sum was not thereafter paid until the year 1896.

"9. That on January 1st, A. D. 1896, the Newport Water Works presented to the City Council of the City of Newport a claim for Twelve Hundred (\$1,200) Dollars for the payment of the four years intervening at Three Hundred (\$300) Dollars a year and for which no payment had been made as aforesaid; that, accompanying said claim was a communication from said Newport Water Works, setting forth the facts upon which it based said claim, a copy of which said communication is hereto attached and marked 'Exhibit D;' that said communication was by said Council referred to the Committee on Water Supply, which said Committee voted on the 26th day of February, A. D. 1896, to recommend the payment of said sum, and that at a meet-

ing of the City Council held March 3rd, 1896, a resolution was passed, authorizing the payment of Twelve Hundred (\$1,200) Dollars 'for water supply for three constantly flowing public fountains used by the City in addition to the one constantly flowing fountain allowed by the contract between the City of Newport and the Newport Water Works for the time ending November 30th, A. D. 1895,' a copy of which said resolution is hereto attached and marked 'Exhibit E,' together with the voucher, showing payment of the same marked 'Exhibit F.'

"10. That thereafter said City continued to pay said Newport Water Works the sum of Three Hundred (\$300) Dollars annually for said three fountains up to February 27th, A. D. 1907, and ever since that time the said City has refused to pay anything over and above the sum of Ten Thousand (\$10,000) Dollars.

"11. That the said Newport Water Works claims that the said City of Newport owed it at the time of the date of the writ in this cause for water furnished said three constantly flowing fountains (in addition to the constantly flowing fountain on Washington Square) the sum of Three Hundred (\$300) Dollars up to November 30, 1907, and the proportional amount of Three Hundred (\$300) Dollars from said day to the day of the date of plaintiff's writ.

"SHEFFIELD, LEVY & HARVEY,

"Attorneys for Plaintiff.

"JEREMIAH A. SULLIVAN,

"Attorney for Defendant."

- (1) The vital question in this case is whether any other constantly flowing fountain, than the one specified as located on Washington Square, is included in the contract set out in the agreed statement of facts. No other such fountain is included in specific terms. If such other fountain or fountains are included in the contract such inclusion must be gathered from the terms of the whole contract. The instrument must be considered in its entirety in order to ascertain

the full scope of its operation and the general plan and intention of the parties as disclosed thereby. "It is a settled rule of construction of contracts, that the intention of the parties must govern when that intention can be clearly inferred from the terms of the contract, and can be fairly carried out consistently with the settled rules of law." Haile, J., in *Anthony v. Comstock*, 1 R. I. 454, 458. See, also, *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197, 202. In this case Rogers, J., quotes Bramwell, J. in *Fowell v. Tranter*, 3 H. & C., 458, 461: "The golden rule of construction is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation."

The contract provides that said Norman shall furnish water to the City of Newport for the next five years, and after the date mentioned "continuously supply said City of Newport with a full and ample quantity of fresh water, to the reasonable satisfaction of said City (from his Water Works and the pipes therewith connected laid in said Newport) for all the public uses of said City, from time to time and at all times, including and comprehending water for use in all the public buildings of said City, comprising the City Hall, the Police Station, the Fire Engine Houses, the Public School Houses and all other buildings, for the use of the Fire Department of said City in extinguishing, preventing and guarding against fire, operating steam fire engines and filling public reservoirs, for sprinkling streets and public places to lay the dust, for flushing sewers and for drinking fountains, and for all other public purposes at an annual compensation which shall never exceed the sum of Ten Thousand Dollars to be paid by said City in equal quarter yearly installments, the first whereof shall be made on the first day of September, A. D. eighteen hundred and eighty one." That he shall begin to furnish and supply said water on said date "at the

rate or price of Seven Thousand Eight Hundred and Ten Dollars per annum, . . . in the buildings and through the hydrants and for fountains and at the price or upon the apportionment here presently set forth, to wit: Water for Fourteen Spring Drinking Fountains of ordinary capacity, and one constantly running or flowing fountain on Washington Square, and for sprinkling streets and flushing sewers, say \$1,800."

- (2) The contract then provides for water and additional facilities for the use thereof, whenever and wheresoever the City may ask for the same, at certain stated rates, viz.:

"Spring fountains of the kind above mentioned at \$25.00 a year each.

"Hydrants also of the kind above mentioned at \$35.00 a year each.

"Steam Fire Engine Houses, as above mentioned, at \$50.00 a year each.

"Hand Fire Engine Houses as above mentioned, at \$10.00 a year each.

"School Houses, as above mentioned at \$20.00 a year each."

For the additional conveniences enumerated for the use of water, certain specific rates are given. It is to be noted that the only rate given for fountains is for "Spring fountains of the kind above mentioned." Said rates are to continue until "the price to be paid by said city for such water and the privileges and means of using the same at the rates aforesaid shall be equal to or exceed the rate of \$10,000 a year in all." The city is then to pay only at said last mentioned rate of ten thousand dollars a year "and all additional or greater use and privilege and means of using said water by the city under this contract shall be free of charge; it being the intent hereof and of the parties hereto that said city may always have as much water as it may need or desire and never pay more than Ten Thousand Dollars therefor in any year unless upon and after the increase of population hereinafter mentioned."

If it was the intention of the parties that constantly flowing fountains might be added from time to time whenever and wheresoever said city might ask for the same, as was provided in regard to the additional facilities mentioned, it seems strange that no provision therefor should be made in this list. Immediately after the provision as to said maximum rate of \$10,000 per year follows the provision that "said fountain on Washington Square, shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by the City at its pleasure, and the water furnished hereunder for fountains and buildings shall be good, wholesome drinking water." In this last provision the distinction seems to be clearly drawn. *The fountain on Washington Square* is to be of a capacity at least equal to that of the fountain now in operation there, while the other fountains, which are clearly spring fountains, shall be located by the City at its pleasure.

Applying the rules of construction stated above, it seems clear, that looking to the contract as a whole it was not the intent of the parties to include under the maximum price of \$10,000 any constantly flowing fountain other than the one particularly specified. The designation of this one fountain constitutes a limitation upon the contract for supplying water for a maximum price. It is a familiar rule, that in (3) the construction of contracts, general terms are restricted and limited by particular recitals when used in connection with them. *Railton v. Taylor*, 20 R. I. 279, 283; *Richmond v. N. Y., N. H. & H. R. R. Co.*, 26 R. I. 225, 226. In the latter case the court, Stiness, C. J., speaking of this rule, said: "Its purpose is to guard against an undue extension of a statute or a contract, when certain items have been specified and then general terms have been used with the enumerated terms presumptively in mind and with the intention to cover things generally of that class. The rule applies only when there has been a preceding statement by which the subsequent provision may be qualified. Pott, Dwarris, 236; Suth. on Stat. Con. § 268; *Railton v. Taylor*, 20 R. I. 279.

If it be urged that the contract is ambiguous upon its face, then evidence of the conduct of the parties set out in the statement of facts is pertinent. From said statement it appears that May 5, 1885, after oral negotiations with the Newport Water Works, which had succeeded said Norman in the business of supplying water under the contract, the city council of said City of Newport, passed a resolution authorizing the erection of three Jenckes Fountains similar to that on Washington Square and approving the payment of the proportional part of three hundred dollars for the balance of the year to December 31, 1885, for the use of water; that in pursuance of said resolution the said three Jenckes Fountains were erected in various parts of the city of Newport and thereupon said city council appropriated and ordered paid the sum of money necessary to erect said fountains and also the proportional part of the sum of three hundred dollars for supplying said fountains with water for the remainder of the municipal year; that after the erection of said three fountains the City of Newport paid to the Newport Water Works for supplying water to these three Jenckes Fountains, the sum of three hundred dollars a year in addition to the sum of ten thousand dollars which said contract had fixed as the maximum price for supplying water per year and continued to pay therefor annually at said rate up to the year 1892; that in that year said City refused to pay said compensation for said three fountains, and said sum was not paid thereafter until the year 1896; that January 1, 1896, the Newport Water Works presented its claim for twelve hundred dollars for the payment for the four years since 1892 for the supply of said fountains, with a communication setting forth the facts upon which it based its claim; and March 3, 1896, a resolution was passed authorizing the payment of said claim; that thereafter the City continued to pay said Newport Water Works the sum of three hundred dollars annually for said three fountains up to February 27, 1907, since which time said city has refused to pay anything over and above the sum of ten thousand dollars. These

- acts may properly be considered as evidence of the construction put upon the contract by the parties. *Davis v. Manchester*, 17 R. I. 577; *Peck v. Goff*, 18 R. I. 94, 96. "Where the construction of an instrument in writing is doubtful, and the parties thereto have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties." *Mueller v. Northwestern University*, 195 Ill. 236, 255. "If this contract is to be regarded as somewhat indefinite or ambiguous, we may resort to the surrounding facts and circumstances as they existed when it was made to aid us in its interpretation and also consider the practical construction which the parties have given it." *Martin, J., in Sattler v. Hallock*, 160 N. Y. 291, 301. In *Woolsey v. Funke*, 121 N. Y. 87, 92, *Peckham, J.*, says: "But if I am not clearly right in this interpretation of the language, it must be admitted, as it seems to me, that the language is somewhat ambiguous or indefinite. Under such circumstances the practical interpretation of this agreement by both parties is a consideration of very great importance." As was said by Mr. Justice Swayne in *Insurance Company v. Dutcher*, 95 U. S. 269, 273: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

We are of the opinion that upon the terms of the contract, considered with reference to the situation and circumstances of the parties at the time of the execution thereof, and in the light of the construction given to the contract by the conduct of the parties since the same went into operation, only one constantly flowing fountain was contemplated by the con-

tract as included under the maximum price of \$10,000 fixed in said contract for supplying water to the City of Newport.

The amount due the plaintiff on the date of its writ was \$378.90. Decision for plaintiff for \$378.90 and costs.

The papers in the case will be sent back to the Superior Court for Newport County, with the decision of this court certified thereon, for further proceedings.

Sheffield, Levy & Harvey, for plaintiff.

Jeremiah A. Sullivan, City Solicitor, for defendant.

FRANK H. STANLEY vs. FIREMAN'S INSURANCE COMPANY.

OCTOBER 10, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Fire Insurance Contracts. Reforming Contract. Parol Evidence.*

Plaintiff alleged that a policy of insurance which was issued in his individual name, was in fact procured for the benefit of himself as administrator and of another person who was heir-at-law of the deceased and that the agent of the defendant who wrote the policy agreed that it should cover such interests. On demurrer:—

Held, that to permit the introduction of parol evidence to show such an agreement, would be founding a right of action on a parol variation of a written contract, and would be an attempt to reform a written contract in an action at law.

(2) *Fire Insurance. Parties to Contract.*

A policy made in the name of one person cannot protect the interest of another, unless it contains words indicating that it is the intention that the interest of the other person be covered.

(3) *Fire Insurance. Parties to Contract.*

One who is not named in a policy, and whose existence is not even suggested therein cannot by parol evidence make himself a party to the contract.

ASSUMPSIT. Heard on exceptions of plaintiff to action of Superior Court in sustaining demurrer to declaration, and exceptions overruled.

VINCENT, J. This is an action of assumpsit brought to recover the amount due under a policy of insurance issued

by the defendant company to the plaintiff. The case is now before the court on exceptions to the decision of the Superior Court sustaining the defendant's demurrer to the plaintiff's second amended declaration.

The plaintiff's declaration, as finally amended, contains among others, the following allegations.

That the plaintiff was duly appointed administrator upon the estate of his wife, Sarah E. Stanley; that he filed his petition in the probate court setting forth that the personal estate of the decedent was insufficient to pay debts and expenses of administration and praying that he, as administrator, might be authorized and empowered to take possession of her real estate, with power to lease, etc.; that he was so authorized and empowered, took possession of said real estate and received the income thereof. That as such administrator he had an insurable interest in said property and that Roger R. Ramsey, the father and heir-at-law of said Sarah E. Stanley, also had an insurable interest therein; that a policy was duly issued to and the premium thereon paid by the plaintiff. That the policy was issued to the plaintiff in his individual name, and that in effecting such insurance he was acting in his capacity as administrator and as agent for Roger R. Ramsey, the heir-at-law of Sarah E. Stanley, and that the defendant through its agent, Arthur O'Leary, who negotiated said insurance and wrote said policy, knew and agreed that said policy was intended to cover, and agreed that it should cover the plaintiff's interest as administrator of said estate and also the interest of the heir-at-law in said property.

The plaintiff's declaration is in two counts, the second count being the same as the first, except that it states separately the amount of the insurable interests of the plaintiff as administrator and the heir-at-law.

To each of these counts the defendant demurred, assigning to each count the same grounds of demurrer, as follows:

"1. That said count sets forth no cause of action in behalf of the plaintiff in his capacity as administrator of the estate of Sarah E. Stanley.

"2. That said count is double in that it alleges two causes of action, namely, a contract with the plaintiff in his capacity as administrator of the estate of Sarah E. Stanley and a contract with the plaintiff as agent of the heir of Sarah E. Stanley.

"3. Said contract sets forth a cause of action in favor of a certain person who is not a party to this action, namely, Jane A. Mills, administratrix on the estate of Roger R. Ramsey, who was heir-at-law and next of kin of Sarah E. Stanley.

"4. That Jane A. Mills, administratrix on the estate of Roger R. Ramsey, who was heir-at-law and next of kin of Sarah E. Stanley, is not joined as a party plaintiff in this action and is a necessary party thereto.

"5. That said count is bad in that it founds a right of action upon a parol variation of the written contract, to wit, upon an agreement between the defendant's agent on the one part and the plaintiff on the other part outside of and in variation of the policy of insurance in said count mentioned.

"6. That said count is bad as being in effect an attempt to reform a written contract in an action at law."

- (1) The policy in question was issued to the plaintiff in his individual name, although he now alleges that it was, in fact, procured for the benefit of himself as administrator and of Roger R. Ramsey, the sole heir-at-law of Sarah E. Stanley.

The plaintiff further alleges that the agent of the defendant who negotiated the contract of insurance and wrote the policy knew that said policy was intended to cover, and agreed that it should cover, the plaintiff's interest as administrator and also the interest of the heir-at-law.

The plaintiff contends that he is entitled to offer parol testimony in support of these allegations and that upon sufficient proof of the alleged agreement and understanding, between himself and of the defendant's agent, he would have the right to recover for the loss which he has sustained as administrator and also for the loss sustained by the heir-at-law, notwithstanding the fact that the written instrument,

by its terms covers nothing more than the individual interest of the plaintiff. There can be no doubt that if it had been indicated in the policy that the same was issued for the benefit of the plaintiff as administrator and of Roger R. Ramsey, or even if the policy had contained some language indicating or suggesting other and distinct interests, that parol testimony might properly be offered to show who the parties were as well as the extent of their interests.

- (2) The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless it contains some words which indicate that it is intended that the interest of some other person be covered. Cooley's Briefs on the law of Ins., Vol. 1, p. 787, and cases cited.

In *Higginson v. Dall*, 13 Mass. 96, the court in its opinion said, "the policy itself is considered to be the contract between the parties; and whatever proposals are made, or conversations had between the parties prior to the subscription, they are to be considered as waived if not inserted in the policy, or contained in a memorandum annexed to it."

In *Insurance Co. v. Lyman*, 15 Wall. 664, Mr. Justice Miller said, "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved, . . . as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contracts, and must have the same effect in excluding parol testimony in its application to it that other written instruments have. . . . To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterwards, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the

law of Louisiana as well as at the common law. The doctrine is too well settled that all previous negotiations and statements are merged and included in the assent to the written instrument as expressing the agreement."

Many other authorities, to the same effect, might be cited were it necessary to do so.

Numerous authorities recognize the admissibility of parol testimony in explanation of the written instrument, when its terms are incomplete or ambiguous, as for instance, where the insurance is effected and the policy issued "for whom it may concern," or for the "owners" of a vessel or cargo, parol testimony may be offered to show who the parties in interest, or the owners, are. But none of the cases cited (3) upon the plaintiff's brief support his contention. None of them go to the extent of holding that a person who is not named in the policy and whose existence is not even suggested therein can, through the aid of parol testimony, make himself a party to the contract and obtain the benefits of its provisions.

Take, for example, the case of *Sheppard v. Peabody Insurance Company*, 21 W. Va. 368, upon which the plaintiff appears to place great reliance. This case, when carefully examined, turns out to be one in which a policy was issued to one John A. Sheppard, administrator on estate of Amos Sheppard, and the question presented to the court was whether or not, the estate being solvent, the administrator had an insurable interest therein.

We think that the introduction of parol testimony, in accordance with the plaintiff's contention, showing circumstances and verbal understandings and agreements, between the plaintiff and defendant's agent, prior to the execution and delivery of the policy, would in effect be founding a right of action on a parol variation of a written contract and would be an attempt to reform a written contract in an action at law, which under the great weight of authority he cannot be permitted to do. If the plaintiff desires to reform his

contract he must do so through a court of equity and not in an action at law.

The plaintiff's exceptions are overruled, and the case is remitted to the Superior Court for further proceedings not inconsistent with this opinion.

Littlefield & Barrows, for plaintiff.

Mumford, Huddy & Emerson, Charles C. Mumford of counsel, for defendant.

LONSDALE COMPANY vs. CYRUS TAFT, Town Treasurer.

OCTOBER 16, 1912.

PRESENT: Johnson, Parkhurst and Sweetland, JJ.

(1) *Town Meetings. Business Required to be Transacted.*

Gen. Laws, 1896, cap. 37, § 8 (now Gen. Laws, 1909, cap. 47, § 8), provides that "The notice to the electors to meet in a town meeting prescribed by law shall be given by the town clerk issuing his warrant, directed to the town sergeant or one of the constables of such town, requiring him to post at least seven days before the day appointed for such meeting, written notifications in three or more public places in the town, of the time when and the place where said meeting is to be holden, and of the business required by law to be transacted therein."

Section 4 of an act, entitled "An act dividing the town of Cumberland into districts for the purpose of voting," passed at the May session, 1856, provides, "A town meeting shall and may hereafter be held annually at the town house in said town, and notified by the town clerk in the warrant for said meeting on the second Monday of June, for the transaction of such general business of the town as may legally come before said meeting:"—

Held, that, as there was no requirement either by general law or special act, that any specified matter of business should be transacted at the annual town meeting of said town, such meeting was not illegal because "the business required by law to be transacted therein" was not stated in the warrant for said meeting and was not contained in the notices to the electors.

(2) *Taxation. Exemptions.*

After the adoption of a resolution of a town meeting "Resolved that the town council be and hereby is authorized for the period of one year from and after the passage of this resolution to exempt from taxation for the period not exceeding ten years any manufacturing property that may hereafter be located in said town of X. in consequence of such exemption and the land upon which such property is or may be located,"

plaintiff petitioned for an exemption of certain property "for a period not exceeding ten years;" and the petition was granted according to the terms of its prayer:—

Held, that a reasonable construction of the vote was that an exemption was granted for a period of ten years.

(3) *Taxation. Period of Exemption.*

A vote exempting property from taxation for a period not exceeding ten years, was passed September 6, 1900. September 15, 1910, the property was assessed:—

Held; that as no steps were taken until September 17, 1900, to bring the property into existence or to locate it upon land in the town and as until such steps were taken there was nothing upon which the exemption could operate, the period did not begin to run until that date.

ASSUMPSIT. Heard on exceptions of defendant and over-ruled.

SWEETLAND, J. This is an action of the case in assumpsit to recover the amount of a tax paid under protest by the plaintiff to the collector of taxes of the town of Cumberland and by him paid over to the defendant as treasurer of said town.

On June 13th, 1900, the electors of said town of Cumberland qualified to vote on a proposition to impose a tax assembled in a meeting, notification and warning of which meeting had been given to the electors, as being the annual town meeting of said town. The legality of this meeting is now questioned by the defendant. At this meeting the said electors passed the following resolution: "Resolved, That the Town Council of the Town of Cumberland be and hereby is authorized for the period of one year from and after the passage of this Resolution to exempt from taxation for the period not exceeding ten years any manufacturing property that may hereafter be located in said Town of Cumberland in consequence of such exemption and the land upon which such property is or may be located."

Said electors, if legally assembled, had authority to pass said resolution under the provisions of Gen. Laws (1896), cap. 44, § 4, now Gen. Laws (1909), cap. 56, § 4. On Sep-

tember 6th, 1900, under the authority thus intended to be given by the electors, the town council of said town exempted from taxation for the period of ten years the manufacturing property which the Lonsdale Company contemplated erecting in said town as an addition to its mill called the Ann & Hope Mill.

The essential part of the plaintiff's petition granted, in accordance with its terms, by the town council is as follows:

"Third. The said Lonsdale Company has determined to abandon manufacturing in its No. 1 Mill, in the Town of Lincoln, and believing that inducements such as have been offered to other enterprises may be obtained for this one, contemplate the erection of a large addition to the Ann & Hope Mill, in the Town of Cumberland.

"Fourth. The outlay proposed is about Three Hundred Thousand Dollars, and the number of hands which will be employed is over three hundred.

"Therefore, your petitioners humbly pray that, acting under the provisions of the General Laws and under the authority conferred upon you by the electors of the Town, you will exempt for a period not exceeding ten years the manufacturing property which the Lonsdale Company contemplate locating in the Ann & Hope Mill yard and the land upon which such property is located.

"And your petitioners will forever pray."

On September 17th, 1900, the plaintiff began the construction of said addition to the Ann & Hope Mill and said addition was thereafter erected. During the nine years following, taxes in the town of Cumberland were assessed annually on the fifteenth day of August in each year. During said nine years, in the description of the plaintiff's Ann & Hope Mill property, appearing in the tax assessors' assessment books in said town, it is noted that "addition exempt." In the year 1910 the financial town meeting ordered the taxes of the town for the year following to be assessed on or before September 15th, 1910. On September 15th, 1910, the "extensions to Ann & Hope Mill & Machinery" were

assessed by the tax assessors of said town, the real estate at \$100,000, the personal estate at \$196,000. The amount of the tax upon the property thus assessed was two thousand nine hundred and sixty dollars. The plaintiff paid said tax under protest; and this suit is brought to recover the amount of the tax so paid.

In the Superior Court the case was tried before the presiding justice sitting without a jury, and decision was given for the plaintiff for the amount of the tax paid with interest from the time of payment. The case is before this court upon the defendant's exception to certain rulings of said justice upon the admission of certain testimony at the trial and to the decision of said justice.

The said exceptions to the rulings of the justice upon the admission of testimony are without merit and are not pressed before this court by the defendant.

Against the decision of said justice the defendant urges that the said town meeting of June 13th, 1900, was not legally assembled and hence that the vote authorizing the town council to exempt manufacturing property from taxation, as contained in said resolution, was without validity. The defendant claims that the said town meeting was not legally assembled because "the business required by law to be transacted therein" was not stated in the warrant for said meeting, and was not contained in the notices thereof to the electors posted by the town sergeant. The said warrant and notices specified the time and place of holding said meeting, but contained no notice of "the business required by law to be transacted therein."

The provision of the Rhode Island statute with reference to the warning of town meetings differs from that of the other New England states. The authority cited by the defendant is undoubtedly based upon the statutory requirement existing in those states, that the warrants and notices of all town meetings shall state the business to be acted upon; and that any action taken at a town meeting shall be

without legal effect, unless the subject matter of the action shall have been stated in the warrant for the meeting.

In Rhode Island, on June 13, 1900, Section 8, Chapter 37, General Laws, 1896, then in force, now Section 8, Chapter 47, General Laws, 1909, was as follows: "Sec. 8. The notice to the electors to meet in a town meeting prescribed by law, shall be given by the town clerk issuing his warrant, directed to the town sergeant or one of the constables of such town, requiring him to post, at least seven days before the day appointed for such meeting, written notifications in three or more public places in the town, of the time when and the place where said meeting is to be holden and of the business required by law to be transacted therein."

- (1) The defendant does not claim that the resolution in question, giving to the town council authority to exempt from taxation manufacturing property thereafter to be located in said town, was a matter of business required by law to be transacted in the annual town meeting, or that the passage of the resolution was invalid because no notice of such proposed resolution was stated in the warrant and notice of said meeting; but the defendant's contention is that to constitute this meeting of the electors a legal meeting, and to give validity to any of the acts of the electors at said meeting, it was necessary that the warrant and notices of said meeting should contain a statement of the business which under the statute the electors were required to transact at said meeting. The defendant's point that the town meeting in question was invalid on this ground is without force unless it appears that the electors of Cumberland, qualified to vote in a financial town meeting are required by statute to transact one or more specific matters of business in the annual financial meeting of the town. The provision that notice of a town meeting prescribed by law should contain a statement of the business required by law to be transacted in such meeting appeared in our statutes long before the town of Cumberland, by special act of the General Assembly, was divided into districts for the purpose of

voting. Public Laws, 1798, p. 328, § 10. This provision has continued in force to the present time. In towns not divided into voting districts the statute has prescribed an annual town meeting for the election of town officers, and also that the electors, on their town election day, should elect as many town officers as the law required. Such election of town officers at the annual town meeting is an instance of business required by law to be transacted in a town meeting prescribed by law. The necessity for notice of such election in the warrant and notices of the annual town meeting in the town of Cumberland ceased when said town was divided into voting districts. In a town so divided all classes of electors of the town no longer meet in one town meeting. Only the so-called taxpaying electors are qualified to take part in what are termed financial town meetings. Does the statute require any particular matter of business to be transacted at the annual town meetings in Cumberland as said meetings are now constituted?

Section four of an act, entitled "An act dividing the Town of Cumberland into districts for the purpose of voting," passed at the May session, 1856, contains the following provision: "A town meeting of said town, shall and may hereafter be held annually, at the Town House, in said town, and notified by the Town Clerk in the warrant for said meeting, on the second Monday of June, for the transaction of such general business of the town as may legally come before said meeting."

The defendant has called the court's attention to the duty imposed upon towns to establish and maintain public schools, to keep the highways and bridges within the bounds of the town safe and convenient for travellers, to relieve and support the poor of the town and to pay the town's proportion of the State tax. The defendant urges that the performance of these duties by the town of Cumberland requires action from time to time by the qualified electors in the financial town meetings of the town; that these matters involve business required by law to be transacted at the annual town

meeting held June 13th, 1900, and that such business should have been specified in the warrant and notices for said meeting. The provisions for raising money, and for granting and voting money by the towns for the purposes above mentioned are not matters of business required by statute to be transacted at an annual town meeting or at any other particular meeting, but may be attended to at any legal meeting of the electors qualified to vote upon the matters. General Laws, 1896, Chapter 36, Sections 3, 4, now General Laws, 1909, Chapter 46, Sections 3, 4.

We do not find in any special act relating to the town of Cumberland or in the general provisions relating to towns, in force on June 13th, 1900, the requirement that any specified matter of business should be transacted at the annual town meeting in question. The meeting was held as the act of 1856, quoted *supra*, provides, "for the transaction of such general business of the town as may legally come before said meeting." The language of the court in *Schoff v. Bloomfield*, 8 Vt. 472, is pertinent to the situation in Rhode Island. In speaking of an annual town meeting held under the Vermont statute then in force the court said: "And no statute requires that the subject matter of business to be done at this meeting should be specifically named in the warning. And as the statute does require this in all special meetings of the town, it does, by fair implication, excuse it in relation to the stated annual meeting. At this meeting it is well known that the town will transact all matters necessary to their corporate interests, and the inhabitants are bound to take notice of that fact, and are bound by the votes of the town, on any subject, whether they attend or not."

The objection of the defendant to the validity of the resolution passed at said town meeting of June 13th, 1900, appears to us to be without force.

- (2) The defendant also objects to the decision of said justice on the ground that the vote of the town council of Cumberland, passed on September 6th, 1900, did not grant to the

plaintiff an exemption from taxation upon the proposed addition to the Ann & Hope Mill for a period of ten years or for any definite period, and that the town might assess a tax upon said addition, when it was erected, and the land upon which it was located at any subsequent assessment of taxes in the town. The town council granted the plaintiff's petition according to the terms of its prayer, which is that "you will exempt for a period not exceeding ten years." A reasonable construction of the vote of the council is that an exemption was granted for a period of ten years.

- (3) If it should be held that the exemption granted was for ten years, the defendant further contends that said period began immediately upon the passage of the vote of exemption by the town council and expired on September 6th, 1910; and that the tax in question, assessed on September 15th, 1910, was without the period of exemption. The conditions which cause this question to arise were brought about by the change in the year 1910 of the time of making the annual assessment of taxes in the town. If August 15 had been fixed as the time of making the annual assessment of taxes in that year, as in the previous years, the defendant would not question that the tax in question came within a ten-year period of exemption.

The language of the statute under the provisions of which this exemption was granted is that the electors of a town may authorize for a period of ten years or less the exemption from taxation of "such manufacturing property as may hereafter be located in such town or city in consequence of such exemption and the land on which such property is located." It is obvious that until such manufacturing property is brought into existence in the town and located upon land in the town there is nothing upon which the exemption can operate and the period of exemption does not begin to run. In the case at bar no steps were taken by the plaintiff to bring said manufacturing property into existence or to locate it upon land in said Cumberland until September 17th, 1900, less than ten years before said assess-

ment of September 15th, 1910. We are, therefore, of the opinion that said assessment of September 15th, 1910, was within the period of exemption granted by the town council. It is argued for the defendant that this construction would permit the plaintiff having the grant of exemption to commence the erection and location of manufacturing property thus exempted at any time, perhaps many years in the future. Such unreasonable delay, if it occurred, would raise another question from that before us, for the plaintiff proceeded expeditiously and eleven days after the grant of exemption selected the land in the town upon which it would locate the said addition and began its erection.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the decision.

Harold W. Thatcher, Robert B. Dresser, Seeber Edwards, Edwards & Angell, for plaintiff.

Quinn & Kernan, for defendant.

In re Petition of ALFRED W. QUIGG, for Writ of Habeas Corpus.

OCTOBER 26, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Bail. Who Authorized to Accept. Habeas Corpus.*

A justice of any district court has authority under Gen. Laws, 1909, cap. 354, §14 and 15, to permit a recognizance to be given before him to release a person committed under process from the Superior Court to answer to an indictment pending in said court, provided the recognizance conforms to the terms of the process under which he was committed, and provided the sureties are accepted by said justice after a suitable examination as to their sufficiency.

This authority is not limited by Gen. Laws, 1909, cap. 305, § 30.

(2). *Habeas Corpus. Bail.*

A writ of habeas corpus ordering the keeper of the jail to produce the body of a respondent committed under process of the Superior Court to answer to an indictment pending in said court, before a justice of a district court

in order that said respondent might there give recognizance, with sureties which had previously been examined and accepted by said justice, will be denied, where it appears that no proper investigation had been made either before said justice or before the Supreme Court upon petition for said writ, as to the sufficiency of such sureties.

HABEAS CORPUS. Relief denied.

PER CURIAM. At the hearing before us it appeared by the testimony that the petitioner, Alfred W. Quigg, is the respondent in ten several indictments pending in the Superior Court for the counties of Providence and Bristol; that he has pleaded not guilty to each of said indictments; that he was required by said Superior Court to give recognizance with sufficient sureties in the sum of three thousand dollars upon each indictment, aggregating the sum of thirty thousand dollars, conditioned upon his appearance before said Superior Court; that for failure to give such recognizances he was committed to the Providence County Jail and is there held in the custody of the acting keeper of said jail.

It further appeared that on October 21st, 1912, the justice of the District Court of the Seventh Judicial District was present within said jail and then and there inquired into the qualifications of two persons, there present before him, to be accepted as sufficient sureties upon said recognizances and as a result of such examination said justice, in substance, stated to said acting keeper, there present, that he found said persons to be sufficient to be taken as sureties upon recognizances in the sum of thirty thousand dollars to be given by said Quigg for the purpose of releasing said Quigg from the custody of said acting keeper; and said justice requested said acting keeper to present said Quigg before said justice, that said Quigg might give said recognizances with said persons as sureties; that the said acting keeper refused to produce said Quigg before said justice as requested.

The petition alleges that by reason of this action of said acting keeper the present imprisonment and detention of said Quigg is unlawful.

The first question presented is as to the authority of a justice of a District Court to permit a recognizance to be given before him to release from custody a respondent held on process issuing from the Superior Court. Sections 14 and 15, Chapter 354, General Laws, 1909, are as follows:

“Sec. 14. Every person who is held on *capias* or other process issuing out of the superior court, any district court, or from any justice of any district court or justice of the peace, to answer to any complaint or indictment against him in or from either of said courts, justices, or justices of the peace, shall be released upon giving recognizance, with sufficient sureties, before a justice of the superior or of any district court, in the sum named in such *capias* or other process, if any have been named therein, and if not, then in such sum as the justice shall deem reasonable, to appear before the court wherein the complaint or indictment against him is pending or to which he may be bound over by any court, justice, or justice of the peace, to appear, to answer to said complaint or indictment and to answer the same whenever called upon so to do, and abide the final order of the court thereon, and in the meantime keep the peace and be of good behavior, and any justice of the superior or of any district court may take such recognizance in any place within the state, and said recognizance shall be returned to the court to which the accused has recognized to appear.”

“Sec. 15. No person imprisoned in any jail upon any criminal process shall be bailed, except by a justice of the superior or any district court or by some person specially appointed for that purpose by a justice of the superior court.”

Under General Laws, 1896, and under the statutes in force previous to that revision, the exercise of the authority given to the justices named in the sections above quoted was restricted to justices of the Supreme Court. Gen. Laws, 1896, Chapter 285, §§ 14 and 15. By Court and Practice Act, Sections 1182 and 1183, this authority was conferred upon

justices of the Superior Court and of any district court. The respondent, the said acting keeper, contends that the scope and intent of the sections above quoted are controlled and limited by the provisions of Gen. Laws, 1909, Chapter 305, § 30. This section is as follows: "Whenever any person is committed to jail on any criminal accusation for want of bail, any justice of the supreme or superior court, or any person specially appointed by either of said courts, may admit him to bail in like manner as might have been done by the court or magistrate who committed him, and the said justices, respectively, shall have power to issue a writ of habeas corpus and to cause such prisoner to be brought before them, whenever it shall be necessary for the purpose expressed in this section." The language of this section does not in terms restrict or limit the power conferred in said Sections 14 and 15. Said Chapter 305, of which said Section 30 is a part, is the chapter entitled "Habeas Corpus." Said Section 30 extends to justices of the Supreme Court who are not named in said Sections 14 and 15, the power of admitting to bail a respondent in a criminal accusation who is committed to jail. There is nothing to indicate that the purpose and intent of said Section 30 is to control or limit the clearly expressed provisions and plain intent of said Sections 14 and 15. We are therefore of the opinion that a justice of any district court has authority to permit recognizances to be given before him to release said Quigg from his present restraint under the process of the Superior Court as above stated: *Provided*, said recognizances conform to the terms of the process under which he was committed, and provided the sureties upon said recognizances are accepted by said justice after a suitable examination as to their sufficiency.

This proceeding in habeas corpus and the order which the petitioner seeks herein, open before us a consideration of the nature of the examination made by said justice into the sufficiency of the proposed sureties upon said recognizances in the sum of thirty thousand dollars to be given by said

Quigg. In our opinion the examination made by said justice, as shown by the testimony, was entirely inadequate to determine the sufficiency of said proposed sureties. We cannot, therefore, grant to the petitioner the relief which he has requested at the hearing before us, viz., that said acting keeper be ordered to produce the body of said Quigg before said justice of the District Court of the Seventh Judicial District in order that said Quigg may there give recognizances with the persons above referred to as sureties. Such order would be a determination by this court that said proposed sureties were sufficient, as to which fact no proper investigation has been made, either before said justice or before this court.

The petitioner Quigg is remanded to the custody of said acting keeper to be held in jail upon his said several commitments.

In the circumstances of this matter as they were disclosed at the hearing before us and in view of the extreme irritation evidently felt and strongly expressed by said justice of said district court towards the representatives of the State in this matter we are obliged to say that in our opinion further proceedings for the purpose of giving said recognizances should be taken before the Superior Court or before some other justice.

John W. Hogan, Philip S. Knauer, Joseph J. Cunningham,
for petitioner.

Herbert A. Rice, Attorney General, for respondent.

GEORGE C. HALL vs. JERRY B. G. TABOR.

OCTOBER 28, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Attachment. Garnishment.*

Attachment by trustee process, being a statutory right, the provisions defining the procedure thereunder, must be strictly construed.

(2) *Jurisdiction. District Courts.*

District courts being courts of inferior jurisdiction, and existing only by statute, have only such powers as are expressly granted to them by law.

(3) *Mesne Process. Writs Returnable, Where.*

Writs of mesne process issued by one district court, cannot be returnable in another district, but must be sued out of the court in which the action shall have been commenced.

DEBT ON JUDGMENT. Heard on exceptions of defendant and sustained.

VINCENT, J. The plaintiff brought suit against the defendant in the District Court of the Second Judicial District, to recover the amount of a judgment previously rendered in his favor and against said defendant, by said court, on the 19th day of January, A. D. 1911. The plaintiff's original writ, instituting the present suit, was dated June 26, 1911, and directed the attachment of the personal estate of the defendant in the hands or possession of the New York, New Haven and Hartford Railroad Company, upon which corporation, as garnishee, service was made.

Following the service of the original writ, the plaintiff, at different times, to wit, August 28th, 1911, November 4th, 1911 and November 17th, 1911, caused to be issued, against the defendant, writs of mesne process, each of which directed the attachment of the personal estate of the said defendant in the hands or possession of said New York, New Haven and Hartford Railroad Company. The original writ, and each of these writs of mesne process, were issued out of the District Court of the Sixth Judicial District and were made returnable to the District Court of the Second Judicial District.

Judgment was rendered for the plaintiff and the garnishee charged in the District Court of the Second Judicial District, whereupon the defendant claimed a jury trial. Later, a hearing was had in the Superior Court, where judgment was again rendered for the plaintiff, and the garnishee again charged.

After the hearing in the Superior Court, the defendant filed his bill of exceptions and the same were duly allowed, as follows:

"1,—that the Court erred in charging the trustee or garnishee in said case;

"2,—that the writs of mesne process issued in said case and dated November 4th and November 17th, 1911, were not legally served upon said defendant;

"3,—that each of said writs were not legally served upon the trustee named therein.

"4,—that said trustee is not properly described in each of said writs."

The defendant contends that the several writs of mesne process, which were issued out of the District Court of the Sixth Judicial District and made returnable to the District Court of the Second Judicial District, were without statutory authority and void, and that one of them, dated November 17th, 1911, was void for the further reason that service of the same was not made six days prior to the return day thereof as provided by law.

- (1) The remedy by attachment is based solely upon statutory enactment and is in derogation of the common law. The right of attachment, by trustee or garnishee process, not being a common law right, but a creation of the statute, the statutory provisions defining it, regulating it, and describing the procedure thereunder must, in all respects, be strictly construed. In other words, our district courts being courts
- (2) of inferior jurisdiction, and existing only by statute, have only such powers as are expressly granted to them by law.

Among the powers granted to district courts is the power of one district court to issue an *original* writ, returnable to any other district court, as appears by Sec. 8, Chap. 299 of the Gen. Laws. This power was not conferred upon such courts at the time of their creation, but was subsequently granted them by Chap. 1066 of the Public Laws, passed at the January session, 1892. It was, therefore, permissible for the plaintiff in the present case to sue out his original writ from the District Court of the Sixth Judicial District,

(3) and make it returnable to the District Court of the Second Judicial District, but it does not follow that a like power existed in the matter of writs of mesne process. The issuance of writs of mesne process is authorized by Sec. 17 of Chap. 299 of the Gen. Laws, which reads as follows: "Sec. 17. The plaintiff in any action may, as often as may be necessary, at any time before final judgment in such action, sue out of the court in which the action shall have been commenced, a writ of mesne process commanding the attachment of the real or personal estate of the defendant, including his personal estate in the hands or possession of any person, copartnership, or corporation, as the trustee of the defendant," etc.

It appears from the section last referred to that the statute does not confer upon district courts the power of making writs of mesne process issued by one district court returnable in another district, but that all writs of mesne process must be sued out of the court in which the action shall have been commenced. The writs of mesne process in the present case were sued out of the District Court of the Sixth Judicial District and made returnable to the District Court of the Second Judicial District, in which last named court the action had been commenced. We must, therefore, sustain the defendant's contention that such writs were without statutory authority and void.

It appears from an examination of the writ of mesne process, dated November 17, 1911, including the officer's return thereon, that there was an absolute failure of legal service, there being a period of less than six days between the date of service and the return day.

There are some other questions raised by the defendant, regarding the service of these writs, but as such writs are already disposed of upon other grounds, the discussion of the other questions cannot profitably be entered into.

The defendant's first, second and third exceptions are sustained and his fourth exception overruled and the case is remitted to the Superior Court for further proceedings.

Ratcliffe G. E. Hicks, for plaintiff. .

John W. Sweeney, for defendant.

GIUSEPPINA P. GAUTIERI vs. BENNIE CIANCIARULO.

OCTOBER 28, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Execution Sale. Mortgages. Officers.*

Where at a sale under execution of personal property, subject to mortgage, the mortgagee bid in the right title and interest of the owner, but refused to pay the amount of the bid in cash, claiming that she was entitled to have the same credited upon the mortgage, the officer properly put up the property again and sold it upon the bid of another party.

ACTION OF THE CASE. Heard on exceptions of plaintiff and overruled.

VINCENT, J. This is an action of the case brought against the defendant, a constable, to recover damages for his alleged default in the proper performance of the duties of his office in making sale of certain personal property levied upon under an alias execution issued out of the District Court of the Sixth Judicial District, said property being subject to a prior mortgage.

It appears from the record and papers in the case that on the 19th day of August, 1908, certain parties named Angelo Ruffo, Marianno Vigneri and Antonino Vaccaro, who were copartners, carrying on a printing business under the name of the Federal Printing Company, made and executed a mortgage upon certain personal property, used by them in their business, to one Giustino De Benedictis; that on November 18th, 1908, the said De Benedictis duly transferred said mortgage to Giuseppina P. Gautieri, the plaintiff; that on the 30th day of July, 1909, the defendant in his capacity of a constable, levied an execution upon the right, title and interest of one J. G. C. Gautieri in said mortgaged property, said execution having been issued upon a judgment against said J. G. C. Gautieri, rendered in the District Court of the

Sixth Judicial District on May 10, 1909, at the suit of one Terrence McQuade.

J. G. C. Gautieri, at the time of the attachment, was the owner of the property, having bought it at a sale under a second mortgage, subject to the first mortgage of De Benedictis.

- (1) Following the levy of the execution the property levied upon was advertised for sale by the defendant and in accordance with said advertisement put up at public auction on October 11th, 1909. At the auction sale the plaintiff bid off all the right, title and interest which J. G. C. Gautieri had therein at the time of the attachment upon the original writ for the sum of \$75. The plaintiff then refused to pay to the defendant the amount of her bid, in cash, and claimed that she was entitled to have the same credited upon, and as part payment of, the mortgage which she held upon said property through the assignment from De Benedictis. The defendant rejected this proposition of the plaintiff and the property was again put up and sold to another party. Subsequently, the plaintiff brought this suit against the defendant, claiming damages, and upon a trial of the same in the Superior Court the jury awarded her the sum of \$385. The case now comes before this court upon the defendant's bill of exceptions. The principal question raised by the bill of exceptions is, was the defendant acting properly and within his rights as an officer in demanding from the plaintiff a cash payment and in refusing to permit the amount to be credited on her mortgage as requested by her? We think that this question must be answered in the affirmative. Any other conclusion would in effect impose upon the officer the settlement of questions of fact concerning which he was uninformed or questions of law which he was unfitted to determine, involving the sufficiency or validity of the mortgage. In the case of *Gerardi v. Caruolo*, 27 R. I. 214, cited by the defendant, this court has said that "The duty of the officer is to sell for cash to the highest bidder who will pay. If he does not pay, it becomes the duty of the officer to sell again."

The defendant's 10th and 13th exceptions are sustained. The other exceptions of the defendant not being important in view of the conclusions already reached have not been considered.

The plaintiff may have the opportunity, if she shall see fit, to appear before this court on November 4, 1912, and show cause, if any she has, why this case should not be remitted to the Superior Court, with direction to enter judgment for the defendant.

William M. P. Bowen, for plaintiff.

Anthony V. Pettine, for defendant.

JOHN W. DODGE *vs.* BRIDGET LAVIN, *et al.*

BRIDGET LAVIN *vs.* JOHN W. DODGE.

JOSEPH H. MARKS, *et al.* *vs.* JOHN W. DODGE.

OCTOBER 30, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Adverse Possession.*

A claim of title by adverse possession involves a mixed question of law and fact, and the court must determine first whether or not the party claiming title has satisfactorily proven the several acts relied upon by him as showing the exercise of dominion over the land, and then having found such acts established, whether they are sufficient in law to create a title.

(2) *Adverse Possession. Exclusive Possession.*

Where it appeared that the acts of ownership of one claiming title by adverse possession, embraced everything that the nature of the premises would naturally demand and were sufficiently continuous and of such a character as would acquaint the owner had he visited the place that claimant was dealing with it as his own, the passing over the premises of persons for accommodation and without any apparent claim of right, would not affect the claim to exclusive possession on the part of claimant.

(3) *Adverse Possession. Claim of Title.*

Where a person through mistake as to the boundary line, takes possession of land belonging to another, believing it to be his own, the holding is adverse and if continued for the requisite period, will give title by adverse possession.

(4) *Adverse Possession. Extent of Claim.*

Upon the question of title by adverse possession of a strip of land extending to the water, where claimant had from time to time filled in the shore front and cultivated the grass, considering the character of the land and the purposes for which it was adapted and all other circumstances:

Held, that claimant not only claimed title to the whole strip, but that her acts assertive of ownership were sufficient to fairly indicate to others that her claim extended to the whole.

BILL IN EQUITY. Heard on petition of complainant Dodge for reargument of cause decided in 34 R. I. 409. Denied.

VINCENT, J. Since the opinion of the court in the above entitled cases, John W. Dodge has filed a motion for reargument. This motion, prepared with much care and skill, exhaustively discusses anew the several questions which were presented to the court at the hearing, and points out a number of errors into which it is claimed the court has fallen in reaching its conclusions.

The court has carefully examined the motion for reargument and considered the questions raised therein without being able to find any sufficient reason for changing its former views.

The motion sets forth that there are three points in the case for consideration, (1) the sufficiency of the acts of possession proved by Mrs. Lavin, (2) the point of time at which the owners of the title had notice of any claim of title by Mrs. Lavin, and (3) whether her possession was exclusive of the owners of the title.

The acquirement of title by way of adverse possession is a matter of statute. The statute provides under what circumstances and conditions title may be thus acquired. When a claim of title by adverse possession is made it (1) devolves upon the court, after due examination, to determine whether or not the party so claiming comes within the provisions of the statute. It is a mixed question of law and fact. The party claiming title offers evidence of certain acts concerning, or dealings with, the estate in question,

which he asserts are sufficient to show an intention on his part to claim the same as his own, and that the character of such acts and dealings were such as would apprise the owner, should he visit the premises, that an ownership adverse to his title was being claimed. Under these conditions two questions are presented to the court, one a question of fact and the other a question of law. In the first place, the court must determine whether or not the party claiming title has satisfactorily proven the several acts relied upon by him as showing the exercise of dominion over the land. Then if the court finds such acts and dealings duly established, it will then proceed to consider the same in connection with the statute for the purpose of ascertaining whether such established facts and circumstances are sufficient in law to create a title by adverse possession.

The determination of the court, upon the question as to whether Bridget Lavin and her predecessors actually did the several acts and things which she now claims were done by her and them and which she also claims are sufficient to give her a title by possession, must be based upon the evidence in the case.

The court in its opinion made use of the expression, "Upon this question of adverse possession a decided preponderance of the evidence seems to sustain the claim of Bridget Lavin in that regard," which read by itself might be misleading, but it will clearly appear from the very next sentence that the preponderance of testimony referred to was in regard to the various acts of Bridget Lavin and her predecessors, such as "filling in," cultivating grass, etc., tending to establish the exercise of dominion on her and their part over the land. The opinion does not assume that Mrs. Lavin and Mr. Dodge stood upon an equal footing in regard to title by adverse possession.

Mr. Dodge first claimed that he, being a tenant at sufferance under the Allins, had exercised dominion over the land in question in various ways which enured to the benefit of the Allins or their heirs and which were sufficient to show

their continued occupation of the premises. Later, Dodge claimed title in himself through deeds procured from the Allin heirs and disputed the title of Mrs. Lavin by possession.

- (2) It satisfactorily appeared to the court that Bridget Lavin and her predecessors had done certain things in and about the land in question as, for instance, the "filling in" of the shore front and the cultivation of grass. The court was also satisfied that the several acts of ownership of Bridget Lavin and her predecessors embraced everything that the nature of the premises would naturally demand and that such acts were sufficiently continuous and of such a character as would acquaint Dodge, or the Allins, had he or they visited the place, that somebody else was treating it and dealing with it as his own, and further, that such acts had continued for a sufficient length of time to meet the statute.

Dodge had not acquired any title for himself by adverse possession through the attempted exercise of any dominion over the land, but on the contrary, when he alleges that he became aware of the claim of Bridget Lavin, he then bestirred himself to obtain deeds from the Allin heirs, which he hoped would vest the title to said property, or at least, the larger part thereof, in himself.

The acts of Dodge, in connection with this land, whether in the interest of himself or the Allin heirs, seem to have been confined to those of a more or less insignificant character which were neither calculated nor designed to express a claim of ownership and which come within what might be denominated as minor trespasses, which are usually unheeded by the owners of shore property, while on the other hand, the acts of Mrs. Lavin and her predecessors were immediately connected with the land and indicated a claim of ownership.

The claim of Dodge that the possession of Bridget Lavin and her predecessors was not exclusive, and therefore ineffective, does not seem to us to be well founded. We do not think that the passing and repassing over these premises of persons who evidently did so under the license of good nature and accommodation, which so often characterizes the owner-

ship of shore property, and without any apparent claim of right, would in any way disturb or weaken the claim of Bridget Lavin that her possession was sufficiently continuous and exclusive to bring her within the terms and intent of the statute.

It is true that Mrs. Lavin and her predecessors did not hold this land under a color of title. The court has already found that the deed of 1857 did not in and by its description and terms include the land in question, but it does not follow, however, that it was not held under a claim of title. Mrs. Lavin and her predecessors apparently understood that such land was covered by the deed of 1857, and she and they have accordingly occupied and exercised rights of ownership over it.

- (3) There is abundant authority that where a person through mistake as to the boundary line takes possession of land belonging to another, believing it to be his own, the holding is adverse, and if continued for the requisite period, will give title by adverse possession. This rule has been adopted in many of the states. (See 1 Cyc. of Law & Pro. 1038 (3) and cases cited.)

- Mr. Dodge further claims, in his motion, that if Mrs. Lavin is found to have acquired any title by adverse possession the same must be restricted to that portion of the strip of land in question actually covered by her in "filling in," growing grass, etc. While some restrictions of that sort might be proper in some cases we do not think they could justly be applied to the present case. We must again, in
- (4) this connection, consider the character of the land and the purposes to which it is adapted. It seems to us when we come to consider these things and all the other circumstances, that Mrs. Lavin not only claimed the whole strip, but that her acts assertive of ownership were sufficient to fairly indicate to others that her claim extended to the whole.

Cases involving title by adverse possession are in character individual. Each case must, in the first instance, be determined from the consideration of the facts and circumstances

which surround it. Then if such facts are established as bring the claimant within the statute he is entitled to the decision of the court confirming his title. This being so, the court does not think that adherence to its opinion in the present case would be attended with the disastrous results, to titles in general, foreshadowed by Mr. Dodge in his motion for reargument.

The motion for reargument does not appear to raise any question which the court had not already considered and the same is therefore denied and dismissed.

Tillinghast & Collins, Harold B. Tanner, for John W. Dodge.

Doran & Flanagan, for Bridget Lavin.

ELMER W. PILLING vs. CLARENCE M. BENSON.

NOVEMBER 18, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Attorney and Client. Release.*

Where an attorney who had been retained to prosecute plaintiff's claim against defendant, arising out of a collision, accepted a retainer from defendant to defend actions brought against him by others, who were also injured in the same collision, and plaintiff who was ignorant of the fact of such retainer, relying largely upon the advice of his attorney, executed a release to defendant, and settled his claim, the release will not be regarded as representing the real consent of plaintiff and will be held to be invalid.

(2) *Attorney and Client. Release.*

Where a defendant knew that an attorney was acting for the plaintiff in an action against him, and never having retained him before, immediately thereafter employed him to act in defence of other actions pending against defendant, arising out of the same accident, and shortly afterwards a release was procured from plaintiff; irrespective of the good faith of the defendant, he will not be permitted to retain the advantage of a release procured under such circumstances.

(3) *Attorney and Client. Release.*

While the fact that the negotiations leading to the release of plaintiff's claim, were conducted on the part of defendant through the agent of an insurance company with which defendant had a contract for indemnity, bears upon the

question of the good faith of the defendant and of the attorney for plaintiff, it cannot vary the rule arising from the relation of attorney and client under which plaintiff was entitled to a full disclosure of every material fact in the possession of the attorney.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained as to amount of damages.

SWEETLAND, J. This is an action of trespass on the case for personal injuries. The case was tried in the Superior Court before a jury and a verdict was rendered for the plaintiff for four thousand dollars. The justice presiding at the trial denied the defendant's motion for a new trial. Said motion was based upon a number of grounds, the essential ones properly addressed to said justice being that the verdict was contrary to the evidence and that the damages awarded by the jury were grossly excessive. The case is before us upon the defendant's exceptions to certain rulings of said justice admitting testimony at the trial and to the decision of the justice denying the defendant's motion for a new trial.

In his declaration the plaintiff alleged that he was injured by being thrown to the ground from a wagon in which he was riding; and that he was so thrown as a result of a collision between said wagon and an automobile, owned by the defendant, and negligently operated by his servant. It appears from the evidence that said automobile was a taxi-cab, so-called, which the defendant by his servant was operating for hire in the streets of the city of Providence. At a trial of the case in the Superior Court before a jury, the defendant did not question the negligence of his servant or the due care of the plaintiff in the circumstances of the accident; but the defendant based his defense to liability entirely upon a release executed by the plaintiff, delivered to the defendant and the consideration therefor paid by the defendant before the commencement of this action. The consideration of said release was two hundred dollars paid to the plaintiff and the payment by the defendant of twenty-five dollars to the plaintiff's physician, in full compensation

for the services of said physician in treating the injuries of the plaintiff resulting from said accident. The plaintiff alleged in his replication to the plea setting up this release that the consideration of said release was wholly inadequate to compensate him for said injuries; that he gave said release upon the advice and persuasion of an attorney who was acting for him at that time; and that at said time the said attorney, without the knowledge of the plaintiff, was also "acting as the attorney and for the benefit of the defendant and a certain liability insurance company, to the plaintiff unknown, in which at the time of said injuries to the plaintiff the said defendant was insured against damages resulting from such accidents as that to the plaintiff." The defendant joined issue upon this allegation of the replication, and this constituted the principal issue between the parties at the trial. The testimony does not justify a finding that the attorney in question at the time of the execution of said release was acting as attorney for such liability insurance company. In his decision upon the defendant's motion for a new trial, the justice of the Superior Court, presiding at the trial, held that the jury was warranted in finding that said release was executed and delivered by the plaintiff upon the advice of said attorney and that unknown to the plaintiff, said attorney was at that time acting as attorney for the defendant in actions for damages for injuries alleged to have been received as a result of said collision by other persons who were passengers in said automobile or taxi-cab at the time of said collision. For that reason, said justice sustains the finding of the jury that said release was invalid.

- (1) From an examination of the testimony we are of the opinion that said determination of the justice was without error. The testimony does not show that said attorney was guilty of misrepresentation, fraud or intentional wrongdoing in the matter, that in advising the plaintiff he was consciously influenced by motives hostile to the plaintiff's interests or that he deceitfully neglected to inform the plaintiff of his retainer by the defendant from a wish to

keep the plaintiff ignorant of that fact. The justice presiding at the trial does not sustain the jury's verdict by reason of such conclusion upon the testimony. But in order to determine that said release is invalid it is not necessary to find that said attorney was guilty of actual fraud. The office of an attorney is one of the highest trust. The client who seeks the advice and assistance of an attorney is entitled to place dependence without question upon that attorney's loyalty. The law recognizes this condition to be for the public good; and the law, the standing of the profession and its value to the community, require that no act of the attorney shall be sanctioned which is inconsistent with that relation of trust and confidence. Before the plaintiff acted upon the advice of said attorney and executed said release he should have been informed that said attorney had been retained and was then acting for the defendant, though not in defense of the plaintiff's claim. A knowledge of that fact might have affected very materially the weight which the plaintiff gave to the advice of said attorney in favor of the compromise and release. In *Williams v. Reed*, 3 Mason, 405, at 418, Judge Story said: "I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client. An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity." Although it is argued for the plaintiff that said

attorney was retained by the defendant to defend the suit brought by said passengers before he was employed by the plaintiff to press the plaintiff's claim against the defendant, it is claimed by the defendant on the other hand, that the facts, upon which the jury and said justice found a retainer of said attorney by the defendant, occurred after said employment of said attorney by the plaintiff, although before the execution of the release. It appears from the testimony that the defendant's statement is correct; that after said attorney had undertaken the prosecution of the plaintiff's claim against the defendant, the defendant, knowing the relation between said attorney and the plaintiff, retained said attorney to defend the actions commenced by said passengers; and that later the defendant received said release from the plaintiff who was ignorant of the fact of said retainer, and who had executed said release, relying largely upon the advice of said attorney. The case of *Stebbins v. Brown*, 65 Barb. 272, involved a motion to set aside the report of a referee for irregularity. The report was in favor of the plaintiff. It appeared that while the case was pending before the referee, who was a practicing attorney, the plaintiff employed him to prosecute two demands against other parties. The referee had not been the attorney of the plaintiff prior to said reference. The court said in granting the motion: "The court does not deem it important to inquire whether the decision of the referee was or was not affected favorably to the plaintiff by his retainer in the matters above mentioned, for we regard such an inquiry as immaterial. We deem it our duty to place our decision upon the unquestioned fact, that while the referee was acting in the trial of this action as an officer of the court, he accepted the retainer of the plaintiff and became, in respect to other matters, his attorney and counsel. The rule should be inflexible, that such a fact will, *ipso facto*, avoid the report of a referee. No other rule will protect the referee from the approach of temptation, or shield the administration of justice from the suspicion of impurity."

The principle stated in *Stebbins v. Brown* is applicable in the case at bar. The court will not inquire whether the retainer of said attorney by the defendant influenced the attorney's judgment, and affected the advice given to the plaintiff which induced the plaintiff to compromise his claim against the defendant. In the absence of exact information as to the real situation given to the plaintiff before he executed the release, said release may be defended against in this action at law; the court will not consider said release as representing the real consent of the plaintiff; and in the circumstances of this case the court must find said release to be invalid.

- (2) The defendant has urged to us that whatever may be said of the conduct of said attorney, the defendant cannot be affected by the attorney's conduct and the release running to the defendant is valid. To that contention it should be said: the defendant knew that said attorney was acting for the plaintiff in prosecuting his claim against the defendant; the defendant had never before retained said attorney or the firm of which he was a member; the defendant immediately employed the attorney to act in defense of the actions above referred to; and this release was procured a short time after, under the circumstances before stated. Without questioning the defendant's good faith, he cannot be allowed to retain the advantage of the release procured in such circumstances.
- (3) We have not overlooked the fact that the negotiations leading to the compromise and release of the plaintiff's claim appear to have been conducted on the part of the defendant through the agent of an insurance company with which the defendant had some contract for indemnity. The legal liability for the plaintiff's injuries was in the defendant, whatever contract for indemnity the defendant had with said company. The fact just stated bears upon the question of the good faith of the attorney and of the defendant and may exonerate them from the charge of intentional wrongdoing; but it cannot vary the rule, which arises from the

relation of attorney and client, under which the client, before exercising his judgment as in this case on the advice of the attorney, is entitled to a disclosure of every material fact in the possession of the attorney. The decision of the justice of the Superior Court denying the defendant's motion for a new trial is without error so far as said decision relates to liability.

The defendant's exceptions to the rulings of said justice made at the trial admitting certain testimony, are without merit, and are overruled.

We are of the opinion that the damages awarded by the jury were entirely unwarranted by the testimony. They are so excessive that they appear to represent the result of passion and prejudice on the part of the jury towards the defendant. The justice of the Superior Court in his decision on the motion for a new trial, says of the amount of damages given by the jury, that they are higher than he would have awarded "if the question of damages in the first instance had been given to the court." Within a few months after the accident the plaintiff was able to engage in severe physical exertion, doing hard, laborious work, taking part in athletic contests, and in other ways conducting himself in a manner inconsistent with his present claim of physical incapacity. We are strongly of the opinion that the amount of the verdict is unjust and that the question of damages should be submitted to the determination of another jury, unless the plaintiff will accept a judgment for one thousand dollars. All of said verdict above the sum of one thousand dollars we adjudge to be excessive.

The defendant's exception to the decision of said justice denying the motion for a new trial is sustained so far as said exception relates to the refusal of said justice to grant a new trial on the ground that the damages awarded by the jury are excessive and unjust.

The case is remitted to the Superior Court for a new trial upon the question of the amount of the plaintiff's damage, unless on or before November 25th, 1912, the plaintiff shall

file in the clerk's office of the Superior Court his remittitur, in which he shall remit all of said verdict in excess of one thousand dollars. In case the plaintiff shall file such remittitur, the Superior Court is directed to enter judgment for the plaintiff in the sum of one thousand dollars.

James A. Williams, for plaintiff.

Boss & Barnefield, for defendant.

TOWN OF EAST GREENWICH vs. NAPOLEON GIMMONS.

NOVEMBER 18, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Deeds. School Districts.*

A deed executed in 1857, acknowledged the receipt of a valuable consideration paid to grantor by the "treasurer of school district No. 2 of the town of East Greenwich," and conveyed premises to "the inhabitants of district No. 2, their heirs, successors and assigns," "to be used to set a school-house upon and other convenient buildings for school purposes and for no other purpose," "to have and to hold to the inhabitants of school district No. 2, for school purposes (so long as it shall be used as such and no longer) to them, their heirs and assigns."

Under Pub. Laws, cap. 1101, passed April 17, 1903, school districts were abolished, and "all title and interest in all of the school-houses, land, furniture and other property which was vested in the several districts shall be vested in the town in which the said districts were located":—

Held, that the conveyance was to the school district as a corporation.

Held, further, that upon the abolition of the district its title became vested in the town for school purposes.

(2) *Construction. "Inhabitants."*

Under the statutes of this State, the word "inhabitants" has always had a corporate rather than an individual significance in relation to municipal subdivisions.

(3) *School Districts. Abandonment.*

Owing to the small number of children in a school district, a school was closed and the children sent to another district, under authority of Pub. Laws, January, 1900, cap. 743. The authorities retained the key of the school house and kept the property therein until it was removed by defendant's grantor. The school authorities had no knowledge of any adverse claim until after an agent of the school committee was sent to make repairs. The building being unlocked, was temporarily secured by the agent, and it

was not until later that defendant was found to be in possession, whereupon proceedings were commenced by the town, within a reasonable time, to recover possession, the school committee having voted upon petition filed by residents of the district to open school therein, as soon as arrangements could be made.

Held, that there was no such abandonment or cessation of use of the premises for school purposes as would warrant a forfeiture, under the above deed.

(4) *School Districts. Constitutional Law.*

Decision *in re* Application of School Committee of North Smithfield, 26 R. I. 164, as to the constitutionality of cap. 1101 of the Public Laws, passed April 17, 1903, transferring the title and interest of abolished school districts to the town, affirmed.

TRESPASS AND EJECTMENT. Heard on agreed statement of facts.

PARKHURST, J. This is an action of trespass and ejectment originally brought in the District Court of the Fourth Judicial District, where decision was rendered for the plaintiff. Thereupon the defendant claimed a jury trial and the case was certified to the Superior Court, sitting in the County of Kent; in that court the parties filed an agreed statement of facts, whereupon the action was certified to this court to be here heard and determined, pursuant to Chapter 298, Section 4, General Laws, R. I., 1909.

The agreed statement of facts is as follows:

"The real estate in question was conveyed under a deed which has been put in here as Plaintiff's Exhibit A.

"The school district number two, which was one of the districts then of the town, continued to hold school in that building down to June, 1902.

"November 15th, 1902, the following vote was passed by the school committee:

"*Voted*: To unite school in district number two with school in district number one, in accordance with the provision of Section 1, Chapter 743, of the Public Laws, for the purpose of securing greater efficiency of the school.

"A true copy, attest,

"*SAMUEL M. KNOWLES, Clerk.*"

"Since that date, June, 1902, no school has been held in this school building, or on this land in question by school district number two, or by the Town of East Greenwich, or any other authority. Frank Kenyon was employed by the Town of East Greenwich for two years to carry children that belonged in district number two to school in district number one. The school books and desks were left in the school-house in district number two. The key to the school-house remained in the possession of the chairman of the school committee of the Town of East Greenwich.

"At a meeting of the school committee of the Town of East Greenwich, held September 6th, 1910, the following vote was passed:

"*Voted:* To open school in the school-house, near Barton's Corner, as soon as arrangements can be made for that purpose.'

"The school-house described as 'near Barton's Corner,' is the school-house in question. That vote of September 6th, 1910, was based upon a petition addressed to the school committee, signed by certain residents, including the afore-said Frank T. Kenyon, setting forth that there were then thirteen children of school age, and asking that that old school-house be reopened; that in the month of December, 1908, the school committee employed L. C. Shippee to make certain repairs on the school-house; that he went to the school-house about Christmas, 1908, for the purpose of seeing what repairs were necessary; that he returned about a week later and found the defendant in possession of the school-house. That during the years from 1902 to 1906, the windows of the school-house became badly broken; that when Mr. Shippee went there about Christmas-time, 1908, to look over the building and make repairs, he found one of the doors open and unlocked, and that he temporarily secured it with a wooden bar; that while the windows were so broken, and the school-house in a dilapidated condition, to wit, in March, 1906, Henry L. Rathbun, who had then purchased the John A. Place farm under his deed which is

filed herewith, had taken possession of the school-house by going through one of these broken windows, removed most of the desks, books, and papers, which he found scattered about the school-room floor, piled them up in his own shed, shoving some of the desks back into a corner of the school building, since which time he has retained possession of the school-house, renting it to the present defendant, Napoleon Gimmons, and other employes of Mr. Rathbun.

"Neither school district number two, nor the Town of East Greenwich, has ever opened up school in that building since June, 1902, but the school committee took steps that are shown in the vote of September, 1910, aforesaid, to open it, at which time Mr. Gimmons, the defendant, was in possession of the school-house, and has remained in possession ever since.

"Neither school district number two, nor the Town of East Greenwich, ever used the real estate in question for any other than school purposes.

"The description in the deed from Josephine Fry and others, heirs of John A. Place, to Henry L. Rathbun, marked 'Defendant's Exhibit 1,' covers the school-house lot, etc., which are the premises in dispute in this case."

The deed marked "Plaintiff's Exhibit A," referred to in the agreed statement of facts, begins as follows:

"TO ALL PEOPLE TO WHOM THESE PRESENTS SHALL COME,

"I, John A. Place, of East Greenwich, in the County of Kent and State of Rhode Island and Providence Plantations, yeoman, Send Greeting: Know Ye, that I, the said John A. Place, for and in consideration of the sum of one dollar, in hand, before the ensembling hereof, well and truly paid by the Treasurer of School District No. 2, of the Town of East Greenwich, the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented and paid; and of every part and parcel thereof do exonerate, acquit and discharge the said district No. 2, of East Greenwich, their heirs, successors, executors and administrators, forever, by these presents; have given, granted, bargained, sold,

aliened, enfeoffed, conveyed and confirmed; and by these presents do freely, fully and absolutely give, grant, bargain, sell, aliene, enfeoffe, convey and confirm unto the inhabitants of the said district No. 2, their Heirs, successors and assigns, forever."

Description of the land follows, substantially as described in the declaration, concluding as follows, "to be used to set a school-house upon and other convenient buildings for school purposes and for no other purpose."

The habendum reads: "To have and to hold the said granted and bargained premises with all the appurtenances, Privileges and commodities to the same belonging or in any wise appertaining to the inhabitants of School District No. 2 for school purposes (so long as it shall be used as such and no longer) to them, their *heirs* and assigns, to their only proper use, benefit and behoof."

Then follow the usual covenants of seizin, quiet possession and full warranty; the deed bears date of execution and acknowledgment November 18, 1857, and is duly recorded the same date.

- (1) Defendant's counsel seems to claim, albeit rather vaguely, that this conveyance of land was not to the School District No. 2, but to the inhabitants; and so, that when the school districts were abolished by Chapter 1101, Public Laws, January, 1903, passed April 17, 1903, Section 1, whereby "all title and interest in all of the school-houses, land, furniture and other property which was vested in the several districts shall be vested in the town in which the said districts were located," the title to the land here in dispute did not pass to the plaintiff town, but remained in the "inhabitants" of the school district; and so it is argued that the plaintiff has no title or right of possession and cannot maintain this action. This contention is without merit. It is to be noted that the grantor, Place, acknowledges the receipt of a valuable consideration for this conveyance as paid to him by the "Treasurer of School District No. 2, of the town of East Greenwich," from which it appears that "School

District No. 2" was at that time an organized school district, having a treasurer; and although the deed is rather artificially drawn, using the word "heirs" as well as "successors," it is quite manifest that it was the intention of the grantor to make the conveyance to the "inhabitants" in their corporate capacity as a school district, rather than in their individual capacity as tenants in common. Our statutes have always recognized the use of the word "inhabitants" as having a corporate, rather than an individual significance, in relation to municipal subdivisions; thus by Chapter 46, Section 1, Gen. Laws, R. I., 1909, "The inhabitants of every town shall continue to be a body corporate, and may, in their corporate name, sue and be sued, prosecute and defend, in any court and elsewhere." The same language, substantially, has been used in every revision of our laws from 1798 down to the present time. The use of the words "inhabitants of town" or "inhabitants of school district" to signify the town or the school district in its capacity as a municipal corporation has been frequent and unquestioned in Massachusetts; and in New Hampshire it has been held that a conveyance to the inhabitants of a school district and their successors is a conveyance to the inhabitants in their corporate capacity and valid. *Chapin and wife v. School District*, 35 N. H. 445, and cases cited, 455.

We are of the opinion therefore that the conveyance "Exhibit A" was a conveyance to "School District No. 2, of the town of East Greenwich," as a corporation.

Defendant's counsel further contends that the deed was a deed upon limitation, and cites the words above quoted as part of the description, to wit: "*To be used to set a school-house upon and other convenient buildings for school purposes and for no other purpose;*" and the words in the habendum clause, "*To have and to hold said granted premises . . . to the inhabitants of said school District No. 2, their heirs, successors and assigns for school purposes so long as it shall be used for such AND NO LONGER,*" as words of limitation; (3) and thereupon claims that the agreed facts show that the

school district has long since and prior to February 23, 1906, abandoned the use of this property for school purposes, and that therefore the land and its improvements had reverted to the heirs of John A. Place, who conveyed to Henry L. Rathbun and wife (Defendant's Ex. I) by deed dated February 23, 1906; and that the defendant Gimmons being a tenant under the Rathbuns is in lawful possession of the premises and is entitled to our decision in his favor.

But we do not find that the facts warrant the conclusion above contended for. While it appears that, owing to the small number of children of school age residing in the district, it was deemed expedient by the school authorities in June, 1902, to close the school, and send the pupils to District No. 1, and that no school has been held there since, it also appears that the school authorities retained the key of the school-house and kept the school property therein, until such property was removed by Rathbun, in 1906; it does not appear that the school committee or anyone in authority had any notice that Rathbun or anyone else was claiming title to the real estate or had removed the property, until December, 1908, when Shippee, acting under orders of the school committee, looked the building over to ascertain what repairs were needed; and it does not appear that, even then, any person was in the actual occupation of the school building, which was found to be unlocked, and was temporarily secured by Shippee. It was not until a week later that the defendant was found to be in possession, claiming under Rathbun; whereupon proceedings were commenced within a reasonable time to test the rights of the parties (see *East Greenwich v. Guenond*, 32 R. I. 224), which having failed for technical reasons, this suit was brought by writ, dated December 14, 1911. It further appears that in September, 1910, after a petition filed by certain residents of the school district, the school committee voted to open school in the school-house on the premises "as soon as arrangements can be made for that purpose."

We do not find under these circumstances any such abandonment or cessation of use of the premises for school

purposes as would warrant a forfeiture. It is manifest that there was at most a temporary cessation of the actual holding of school in the school-house for reasons of expediency under the authority of Chapter 743, Public Laws, R. I., January, 1900, page 43; but this is no evidence of an abandonment such as to work a forfeiture. It is quite consistent with all the facts in the case, that the school committee had all the time the intention to reopen the school as soon as it would be expedient and proper so to do, and that retaining the key and keeping the school property in the house and the sending of a carpenter to see what repairs were needed, and finally the vote to reopen the school as soon as it was made to appear to the committee that there were pupils enough to warrant it, were all facts consistent with such intention, and inconsistent with any intention to abandon the use of the property for school purposes. In our view of the facts, it becomes unnecessary to discuss whether or not in the event of forfeiture the estate would revert to the heirs of John A. Place, so that they could convey good title. We are satisfied that by his deed, "Exhibit A," Place conveyed the land to School District No. 2, as above shown, for school purposes; that School District No. 2 never abandoned the premises, but continued to hold them with all the buildings thereon for such purposes down to the abolition of the School District No. 2 by Chapter 1101, Public Laws, R. I., January, 1903; whereby such title as School District No. 2 had, became vested in the town of East Greenwich and still remains in said town for school purposes; and it therefore becomes unnecessary for this court to discuss the authorities cited on behalf of the defendant in support of his claim that this conveyance was upon a conditional limitation and that upon forfeiture the estate reverted to Place's heirs and passed from them to the defendant Gimmons.

There is also a rather vague suggestion in the defendant's brief that the act transferring the title and interest of abolished school districts (Chapter 1101, *supra*) to the town

is unconstitutional; that question was fully discussed and settled in favor of the act by this court in *re Application of School Committee of North Smithfield*, 26 R. I. 164; and needs no further discussion.

In view of the foregoing this court hereby gives decision for the plaintiff for possession and costs without damages (which are expressly waived upon the plaintiff's brief before this court).

The papers in the case will be sent back to the Superior Court within and for the County of Kent with the decision of this court certified thereon; for the entry of final judgment upon the decision.

Quinn & Kernan, for plaintiff.

Samuel W. K. Allen, for defendant.

In re Petition of ANTONIO MARIANO for Writ of Habeas Corpus.

NOVEMBER 25, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Bail.*

The power of the Superior Court to require additional bail to be given is not restricted to the circumstances named in Gen. Laws, 1909, cap. 298, § 23, providing that whenever a person convicted of any crime shall file a motion for a new trial or notice of his intentions to prosecute a bill of exceptions, the Superior Court may require him to give additional bail, but the court has inherent authority to require additional bail in cases pending before it whenever in its judgment such additional bail becomes necessary to secure the presence of a respondent before it for trial or sentence, provided it be not excessive in amount.

(2) *Bail.*

Where a respondent fails to give additional bail and is committed to jail for such failure, his obligation and that of his sureties upon the original recognition are discharged.

HABEAS CORPUS. Petition denied.

SWEETLAND, J. The petitioner represents, and it is made to appear, that he is the respondent in an indictment charging him with the crime of manslaughter; that said indictment is pending in the Superior Court for the counties of Providence and Bristol; that upon a trial of said indictment in said court before a jury he was found guilty; that the period within which he may file a notice of his intention to prosecute a bill of exceptions to this court or may file his motion for a new trial in the Superior Court has not yet expired, and that he has not filed such notice or motion; that prior to said trial of said indictment he was admitted to bail by said Superior Court in the sum of two thousand and five hundred dollars and entered into a recognizance in said sum with sufficient sureties; that certain of the conditions of said recognizance were that the petitioner should appear in said Superior Court whenever said indictment should be called for trial or whenever said respondent should be required to appear for sentence; that none of the conditions of said recognizance has been broken and said recognizance has not been defaulted; that after the petitioner had been found guilty at said trial, Mr. Justice Rathbun, the justice of the Superior Court, presiding at said trial, required the petitioner to enter into a new recognizance with sufficient surety in the sum of eight thousand dollars; for failure of the petitioner to enter into such recognizance he was committed to the Providence County Jail, and is there held in the custody of the acting keeper of said jail.

The petitioner claims that his restraint in said jail is without legal cause and applies for a writ of habeas corpus.

The petitioner urges that after accepting said recognizance given prior to said trial, the Superior Court was without authority to require the respondent to enter into a further recognizance for his appearance upon said indictment, while said recognizance in the sum of two thousand and five hundred dollars remained in full force, undefaulted, with none of its conditions broken, and before the petitioner had filed a motion for a new trial or notice of his intentions to prosecute a bill of exceptions. He calls our attention to Chap. 298,

- (1) Sec. 23, Gen. Laws, 1909, and urges that the authority to require additional bail given in said section is exclusive of any power in the court to require additional bail in other circumstances. Said section is as follows: "Whenever a person convicted of any crime shall file a motion for a new trial or notice of his intentions to prosecute a bill of exceptions, the Superior Court may require such person to give additional bail."

We are of the opinion that the power of the Superior Court to require additional bail to be given, is not restricted to the circumstances named in said section. From the nature and the purpose of criminal proceedings, the authority is inherent in the Superior Court to require respondents in criminal cases pending before it to give additional bail whenever in the judgment of that court, such additional bail becomes necessary to secure the presence of the respondent before it for trial or for sentence, provided the additional bail required be not excessive in amount. The jurisdiction of the court to try the respondent upon the charge against him or to impose sentence upon him is dependent upon his presence before the court at the trial or at the time of sentence as the case may be. The purpose of holding a respondent in custody is to secure his attendance at the trial or for sentence; and when he is bailed, although the immediate custody over him passes to the surety or sureties upon the recognizance, it is not intended thereby to jeopardize the right of the state to proceed against him upon the criminal charge. Our constitution provides that "all persons imprisoned ought to be bailed by sufficient surety, unless for offences punishable by death or by imprisonment for life, when the proof of guilt is evident or the presumption great." In accordance with this provision of the constitution, respondents are admitted to bail in such sums and with such sufficient sureties as in the opinion of the court or magistrate accepting bail will guarantee the attendance of the respondent for trial or for sentence.

The purpose of a criminal proceeding is not to secure to the state, the obligation of the respondent and the sureties in a penal sum. Such obligation is merely incidental to the

main proceeding; is taken for the benefit of the respondent; and is permitted, as far as such grace can be granted, without affecting the rights of the state or the performance by the state of its duty under the criminal law. By the acceptance of such recognizance by the court, the state does not bargain away for a penalty, its rights to have the attendance of the respondent when required, nor does the court lose its authority to take such action as it may consider necessary to further its execution of the law. *In re James*, 18 Fed. Rep. 853. If the recognizance be defaulted the right of the state is not restricted to a recovery of the penalty, but it may take proceedings to enforce the penalty, and at the same time, bring the respondent before the court and go on with his prosecution upon the criminal charge.

We are aware that a few courts have doubted their authority, in the absence of statute for that purpose, to require new or additional bail for the appearance of a respondent, while a recognizance already given by him for that purpose remained in full force with its conditions unbroken, and the respondent had not been surrendered by the sureties. We find no such difficulty. In entering into such prior recognizance, the petitioner acquired no vested rights superior to the right of the state to have him in court without fail when required. In such recognizance there is no express, and we find no implied, provision that he shall not be required, upon a change of circumstances, to furnish further bail. The giving of additional bail does not enlarge his obligation upon the prior recognizance, even if it does not discharge it. If he fails to furnish such additional bail, (2) and is committed to jail for such failure, as this respondent has been, his obligation and that of his sureties upon the recognizance already given undoubtedly is discharged.

We are of the opinion that said justice was acting within his jurisdiction in making the order complained of; and that the present detention of the petitioner in jail is not illegal.

Petition denied and dismissed.

Anthony V. Pettine, for petitioner.

Livingston Ham, Assistant Attorney General, for State.

ERNEST FOXWELL vs. JOHN C. SULLIVAN, Town Treasurer.

NOVEMBER 25, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Municipal Corporations. Notice of Claim.*

Within the period limited by statute, plaintiff gave two notices to a town of a claim for damages, arising out of an accident upon a highway, the first being defective. In his declaration he set up the second notice without referring to the first.

Held, that the intention to abandon the first notice was sufficiently evidenced by the fact that he declared only upon the other.

Held, further, that while it might not have been necessary to set up the notice in the declaration, having set up the second notice, evidence offered relating to the first notice was irrelevant.

(2) *Notice of Claim Against Town for Injury. Sufficiency of Notice. Errors.*

In order to invalidate the statutory notice given a town of a claim for damages arising out of an injury upon a highway, the error must amount to a substantial defect, through which the notice fails to convey to the town the information required by statute, with reasonable certainty. If the notice is sufficient, notwithstanding the defect to apprise the officers of the town with reasonable certainty as to the time, place, etc., of the accident, it is valid.

Where a notice first described the place of the accident with accuracy, but continued with an erroneous description of intersecting streets, owing to the confusion of Elm street with Eli street, and it appeared that the facts set out in the notice could not apply to Elm street, but with the other description contained in such notice did apply to Eli street, the notice was sufficient to advise the town with reasonable certainty of the necessary facts.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and sustained.

VINCENT, J. This is an action of trespass on the case for negligence to recover damages for injuries which the plaintiff claims that he suffered by falling over the cap of a water pipe which extended above the east sidewalk of Broad Street, in the town of Cumberland.

At the close of the testimony a verdict for the defendant was directed by the Superior Court on the ground that the

notice to the town required by statute as a condition precedent to the commencement of a suit was insufficient or defective. To this direction of a verdict the plaintiff took an exception. The plaintiff also took exception to the ruling of the trial court upon the admission of certain testimony. On these exceptions of the plaintiff the case is now before this court.

The plaintiff, on the 5th day of April, 1911, gave a written notice to the town as provided in Sec. 16, Chap. 36 of the Gen. Laws. The plaintiff having apparently discovered later that this notice was defective in that it failed to properly describe the place of the accident, gave a second notice in writing to the town on the 4th day of May, 1911. It is undisputed that both of these notices were given within the period limited by the statute.

- (1) The plaintiff in his declaration sets up the second notice without making any reference to the first one. We think that it is quite evident that he intended to abandon the first notice and his intention to do so is sufficiently evidenced by the fact that he declared only upon the other. Had he relied wholly upon the first notice at the trial, after having declared only upon the second, he could not have maintained his suit. It was not perhaps necessary to set up the notice in the declaration, but having done so and having set up the second notice alone, the first notice should have been considered as abandoned and the evidence offered relating to it should have been eliminated from the consideration of the case.

The defendant contends further, however, that the second notice is inherently defective and insufficient in that it fails to properly describe the place of the accident, and upon that ground, a verdict for the defendant was directed. The notice is as follows:

"TO THE HONORABLE THE TOWN COUNCIL OF THE TOWN OF CUMBERLAND: Respectfully represents Ernest Foxwell, of Valley Falls, in said Town of Cum-

berland, that on Sunday, March 26, A. D., 1911, he was walking along the easterly sidewalk on Broad Street, a public highway of said town; that on the said easterly sidewalk of said Broad Street, a public highway of said town, at a point about ten feet south of the southwesterly corner of the building numbered 263 on said Broad Street, and directly opposite the interception (intersection) of the northerly sidewalk of Elm Street with the westerly side of said Broad Street, there was an obstruction dangerous to travellers in this,—that there was in said sidewalk a certain water-cap which projected above the level of the sidewalk about an inch and a half,—of which defect said Town of Cumberland had reasonable notice, or might have had reasonable notice by the exercise of proper care and diligence on its part; that your said petitioner, Ernest Foxwell, while in the exercise of due and reasonable care, struck with his foot said obstruction and was thereby thrown to the sidewalk with great force and violence; that by reason of being thrown in this manner, through the defect and obstruction in said sidewalk, said claimant's knee and back were injured; that said injury to claimant's knee is a traumatic synovitis of the knee-joint; that the injuries thus received are permanent, and said claimant is now confined to his bed under the care of a doctor; that he has been rendered absolutely unable to follow his usual employment and has been and will be put to great expense for doctor's bills, medicine, care and attendance; that his damages in all amount to the sum of four thousand (\$4,000) dollars, for which sum he now presents his claim to this Honorable Body and requests that the same be allowed.

“ERNEST FOXWELL,

“By his Attorney,

“P. E. Dillon.”

- (2) The portion of the notice referred to as insufficiently describing the place of the accident is “that on the said easterly sidewalk of said Broad Street, a public highway of

said town, at a point about ten feet south of the southwesterly corner of the building numbered 263 on said Broad Street, and directly opposite the intersection of the northerly sidewalk of Elm Street with the westerly side of said Broad Street, there was an obstruction dangerous to travellers in this,—that there was in said sidewalk a certain water-cap which projected above the level of the sidewalk about an inch and a half."

It appears that in the general locality where this accident is supposed to have occurred there are two streets running at right angles with Broad Street, viz: Elm Street and Eli Street. Elm Street is some 350 feet south of Eli Street and opposite its intersection with Broad Street there are no houses and consequently no water gates or caps. It is vacant land. There are no water gates or caps within 200 feet of such intersection. On the easterly side of Broad Street, near the intersection of Eli Street, from 11 to 13 feet south of the southwesterly corner of the house numbered 263 on said Broad Street, otherwise referred to as the "Keefe" house, there is a water-cap or gate and there is no other water-cap on the easterly side of Broad Street so located that it could be confused with the one referred to in the notice as "about ten feet south of the southwesterly corner of the building numbered 263 on Broad Street."

It is quite apparent from these facts that through some inadvertence in the preparation of the notice "Elm Street" was substituted for "Eli Street."

The town is entitled to such notice as would inform its officers with reasonable certainty as to the time and place of the injury and as to the character and nature of the defect which caused it, so as to aid them in their investigation of the question of liability. It is not every error, however, that amounts to a substantial defect sufficient to invalidate the notice. *Perry v. Sheldon*, 30 R. I. 426. The error or defect must be one through which the notice fails to convey to the town the information required by the statute, with reasonable certainty. If, on the other hand, the notice is

sufficient, notwithstanding the defect, to apprise the officers of the town with reasonable certainty as to the time, place, etc., of the accident, it must be held to be a good and valid notice.

In the case at bar, the notice first described the place of the accident as the easterly sidewalk of Broad Street, about ten feet south of the southwesterly corner of the building numbered 263 on said Broad Street. Had the plaintiff stopped there, no question could have arisen, as that description of the place was definite and sufficient, but he continued on, adding the words "and directly opposite the intersection of the northerly sidewalk of Elm Street with the westerly side of said Broad Street." The addition was erroneous, as Elm Street is some 350 feet south.

If we take into consideration the accuracy with which the notice first describes the place, together with the fact that at the intersection of Elm Street, there is only a vacant lot, and no water gates or caps whatever, it at once becomes apparent that the place of the injury was at or near the intersection of Eli Street, about 10 feet south of the southwesterly corner of the building numbered 263 on Broad Street, and that the town was advised thereof with reasonable certainty.

The plaintiff's exceptions are sustained, and the case is remitted to the Superior Court, with direction to grant the plaintiff a new trial.

John J. Fitzgerald, Patrick E. Dillon, for plaintiff.

Quinn & Kernan, for defendant.

*In re Complaint of ALBERT B. CRAFTS vs. MAXIMILIAN L.
LIZOTTE.*

NOVEMBER 18, 1912.

PRESENT: Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) Attorneys at Law. Disbarment Proceedings.

Whether or not an attorney shall be disciplined rests in the discretion of the court, upon examination of the facts connected with the special complaint against him, and such other facts as may appear during its investigation, and the court is not limited to the precise charges of the complaint, but may act upon any other information which it may properly and regularly acquire. The court is not bound in its action by any particular rule of law, nor is it essential that the basis of discipline should be acts creating civil or criminal liability, but a proper basis for action may be found in conduct evidencing an unfitness for that confidence and trust which necessarily attends the relation of attorney and client or in such lack of honesty and moral character as would render the party under examination unworthy of confidence. Aside from the conduct of an attorney in connection with professional affairs, any conduct demonstrating a moral condition inconsistent with the proper appreciation and discharge of professional duties and obligations may also form a just basis for discipline.

(2) Attorneys at Law. Disbarment Proceedings.

Upon a complaint against a member of the bar evidence considered and held to warrant disbarment.

COMPLAINT against an attorney at law. Order for disbarment entered.

VINCENT, J. On August 2, 1911, and on September 1, 1911, Albert B. Crafts filed in this court certain complaints against Maximilian L. Lizotte, both being members of the bar of Rhode Island. The complaints so filed alleged a variety of misdoings on the part of Mr. Lizotte which, as the complainant claims, demand the disciplinary action of this court.

These complaints were referred, in the usual course, to the "Committee on Complaints against Members of the Rhode Island Bar" for examination and report. Before this committee, the parties interested appeared with their

witnesses, offered testimony and presented arguments. The committee considered the several matters embraced in the complaints, and made its report to this court. They found that only the second and fifth complaints were worthy of further examination. They are as follows:

(2) "That on or about the 6th day of June, A. D., 1911, the said Lizotte with malicious and evil intent procured and induced one A. F. Zainey and one Joseph M. Soucher to falsely represent and complain to the said complainant and William H. McSoley, as attorneys, that the said Lizotte had, while suspended from practice at the bar of this State, as an attorney and counsellor, accepted in said Providence a retainer of Fifty (50) Dollars in a certain case and that at said time the said Lizotte had represented to said Zainey that he had been reinstated and was eligible to accept retainers and practice before the bar of this State, and for said purpose on said 6th day of June, A. D., 1911, the said Lizotte signed a false receipt for Fifty (50) Dollars, dated January 24, 1911, to be presented by said Zainey and Soucher to this complainant and said McSoley, and on said 6th day of June, A. D., 1911, the said Zainey and said Soucher by the procurement, consent, and connivance of the said Lizotte, presented said receipt to the said complainant and said McSoley, with malicious and evil intent.

"And the complainant in fact alleges that the said Lizotte had never accepted any retainer in any such case, as alleged, and that said case and all the allegations concerning the same made to the complainant and said McSoley as afore-said, and said receipt were wholly fictitious and untrue."

(5) "That the said Lizotte, on, to wit, the 17th day of May, A. D., 1909, having in his hands a check, dated May 14, 1909, for \$4,515, signed by Starkweather & Shepley, and payable to M. L. Lizotte and A. B. Crafts, as attorneys of one Shultz, which check had been received by said Lizotte in settlement of a certain case in which said Lizotte and this complainant had been jointly interested as attorneys for the plaintiff, with the fraudulent intent to deprive the com-

plainant of his proper share of the profits and compensation in said case, as attorney for the plaintiff without any authority from, or knowledge of the complainant, and with the intent to cash said check without the knowledge or consent of this complainant endorsed his name and the name of the complainant upon the back of said check, and thereafter, after said check had been endorsed and cashed by the consent of the complainant, the said Lizotte refused to pay the complainant his full share of the compensation, to which the complainant was entitled by agreement with the said Lizotte, for services in said case, and retained and deprived the complainant of the sum of \$925.00, to which he was entitled as aforesaid."

Following the receipt of the committee's report, Mr. Crafts and Mr. Lizotte were cited to appear with their witnesses before this court, where they have now been fully heard *de novo* as to the matters specified in the two complaints above quoted.

The court has considered the evidence presented and the arguments of counsel thereon with much care and deliberation.

There are certain well defined principles which should govern the court in the consideration and disposition of matters of this sort. Members of the bar are officers of the court and as such are amenable to the court for their proper
(1) conduct. Whether or not an attorney shall be disbarred or otherwise disciplined is a matter resting in the discretion of the court after learning and examining the facts and circumstances connected with the special complaint against him, and such other facts and circumstances as may appear during its investigation. The court is not limited to the precise charges of the complaint, but may act upon any other information which it may properly and regularly acquire. The court is not bound in its action by any particular rule of law, nor is it essential that the basis of discipline should be acts creating civil or criminal liability. A proper basis for disciplinary action may be found in conduct evidencing an

unfitness for that confidence and trust which necessarily attends the relation of attorney and client or in such lack of honesty and moral character as would render the party under examination unworthy of confidence. While investigations of this character usually have reference to the conduct of the attorney in his connection with professional affairs, yet, any conduct which demonstrates a moral condition inconsistent with the proper appreciation and discharge of professional duties and obligations may also form a just basis for disbarment or the imposition of some lesser punishment. In fact, any conduct which would preclude admission to the bar, might well justify a disbarment thereafter, whether such conduct be associated with the discharge of strictly professional duties and obligations or clearly separated therefrom.

Bearing in mind this brief and general statement governing investigations of this character we will now proceed to take up these complaints in their order, first with reference to Mr. Lizotte and second with reference to Mr. Crafts.

Mr. Lizotte and Mr. Crafts for some years had occupied the same suite of offices and although not at any time acting together as general copartners, they had had frequent business relations, assisting each other in their respective legal matters, including the trial of cases in court. After a time their relations became much strained, eventually leading to an open rupture and separation with marked ill feeling upon both sides. It is apparent that the filing of these complaints by Mr. Crafts was one of the fruits of this ill feeling and that except for this rupture in their relations perhaps the alleged misdoings of Mr. Lizotte might never have been called to the attention of the court.

Passing over much testimony which does not appear to be relevant to the more important questions presented for our consideration, we come down to June, 1911, and to the consideration of the occurrences during that month and subsequently.

As we have before stated Mr. Crafts and Mr. Lizotte after being associated in the same offices and somewhat in

business for a period of several years, had quarreled and separated. As to the underlying causes which led to this quarrel and separation or as to the merits of their contentions we need not be concerned. A simple reference to the existing and resultant situation is quite sufficient. Mr. Lizotte was under suspension for unprofessional conduct, and his suspension had been extended for his failure to respect the order and decree of the court. He was convinced, as he testifies, from what Mr. Crafts had said to him and from what he had learned that Mr. Crafts had said to others about him, that his troubles in the matter of suspensions had originated in the enmity of Mr. Crafts.

At this juncture in the relations of Mr. Crafts and Mr. Lizotte, it becomes important to scan the activities of one A. F. Zainey, who some five years previously had been, for a time, in Mr. Lizotte's office as a student at law. After the withdrawal of Mr. Zainey from his office Mr. Lizotte had met him in a casual way, perhaps on an average of once a month, but they had had no further business relations or interests in common.

About the beginning of June, 1911, as Mr. Lizotte testifies, Mr. Zainey came to his office and told him that he had been to Mr. Crafts' office where he had talked with Mr. Crafts and that from the latter's conversation he had become satisfied that he was hostile to Mr. Lizotte, also repeating to Mr. Lizotte what Mr. Crafts had said. Two or three days later Mr. Zainey came to Mr. Lizotte's office again, after a second visit to, and conversation with, Mr. Crafts, and again told what Mr. Crafts had said. Mr. Lizotte testifies that prior to each of these two visits of Mr. Zainey to Mr. Crafts he was not aware of any intention on the part of Mr. Zainey to make such a visit and that neither of them were brought about or encouraged through any intimation or suggestion on his part, but had their inception in the friendly feeling of Mr. Zainey toward himself. Just when, how, where or under what circumstances Mr. Zainey first became informed as to the existing hostile conditions between Mr. Crafts

and Mr. Lizotte, or how he ascertained that his interference in the matter would be agreeable to Mr. Lizotte, does not appear.

During this second visit of Mr. Zainey, Mr. Lizotte signified to him his approval of what he had done and the desirability of further operations in the same direction, designed to develop more definitely the hostile attitude of Mr. Crafts and to ascertain just how far Mr. Crafts would go in his attempts to injure him. Mr. Zainey then outlined a method of further procedure, requesting Mr. Lizotte, in order to make the scheme more effective, to make up and give to him a paper purporting to be a receipt for \$50 on account of legal services.

In this emergency a man, variously called Joseph M. Soucher, Mr. Zuker, Mr. Sumara and Mr. Samra, is brought in to Mr. Lizotte by Mr. Zainey and, upon being introduced, poses as a claimant for damages for personal injuries against the Social Mills. Mr. Lizotte makes and delivers to these two men the following receipt: "Jan. 24, 1911. Received of Thomas Samra fifty dollars for services in bringing . . . against Social Mills for injuries to said Samra. M. L. Lizotte."

It is admitted that the claim of Mr. Samra and the receipt are purely fictitious and that the latter was concocted by Mr. Zainey and Mr. Lizotte to be shown to Mr. Crafts in furtherance of their scheme to obtain a more complete knowledge of the latter's attitude. It is also admitted that this receipt was given in June, although it bears date as of the 24th of January preceding.

Having obtained this document Mr. Zainey took it to the office of and exhibited it to Mr. Crafts and solicited the latter's services in behalf of Mr. Samra to recover the \$50 which he pretended had been paid to Mr. Lizotte as the receipt evidenced. Upon the refusal of Mr. Crafts to entertain the matter without first seeing and talking with Mr. Samra and having the receipt placed in his hands, Mr. Zainey departed to return again in the course of half an hour,

accompanied by Mr. Samra. Through Mr. Zainey, as interpreter, Mr. Samra then said to Mr. Crafts that in January, 1911, he had engaged Mr. Lizotte as attorney to prosecute a claim against the Social Mills; that he knew at the time that Mr. Lizotte had been disbarred, but that Mr. Lizotte had told him that he had been fixed up all right; that he had paid Mr. Lizotte \$50; that he had seen Mr. Lizotte frequently and asked him to do something about the case without avail and that Mr. Lizotte had finally refused, upon demand, to return the money or bring a suit.

These statements of Mr. Samra were then embodied in an affidavit prepared by Mr. Crafts, or at his instance. The affidavit was interpreted to Mr. Samra by Mr. Zainey. A second affidavit was also prepared to be executed by Mr. Zainey to the effect that the first affidavit had been correctly interpreted by him to Mr. Samra.

Upon the completion of these affidavits and after the parties who were to execute them had been made acquainted with their contents, Mr. Crafts deeming it desirable that their execution should take place before some magistrate entirely disinterested, Mr. Zainey and Mr. Samra were taken by Mr. William H. McSoley to the office of Patrick P. Curran, Esq., for that purpose on the 8th of June, 1911. Mr. McSoley, who is a member of the bar and was then associated with Mr. Crafts, had been present at the several interviews between Mr. Zainey, Mr. Samra and Mr. Crafts, and had also assisted in the preparation of one or more of the affidavits. Upon their arrival at Mr. Curran's office, Mr. McSoley informed Mr. Curran as to the purpose of their visit. Mr. Zainey and Mr. Samra then refused to sign the affidavits, saying to Mr. McSoley, "We got you now. We are friends of Mr. Lizotte. You and Crafts are trying to injure Lizotte," and supplementing these remarks with the presentation to Mr. Curran of the following paper, which Mr. Lizotte admits that he had previously seen and approved.

"Mr. Curran:

"I have called on you at the suggestion of Messrs. Crafts and McSoley, on a supposed complaint against Mr. Lizotte.

"I wish to say that I am friendly with Mr. Lizotte. I have heard that Crafts and McSoley were behind complaints against Mr. Lizotte, and I wanted to ascertain for my own satisfaction if either Mr. Crafts or McSoley had any ill feeling against Mr. Lizotte and whether or not they would injure him if they could.

"I therefore went to see Crafts and McSoley with a fictitious claim against Mr. Lizotte.

"I will say that Mr. Lizotte is not responsible for this job, although he understands that I am trying to find these facts.

"I have nothing against Mr. Lizotte except the best of feelings and sympathize with his last and present hard luck, but condemn most heartily his prosecutors Crafts and McSoley.

"Now that I am satisfied that either or both Crafts or McSoley would prosecute Mr. Lizotte if they had the chance—my purpose for coming here has been accomplished.

"Good-day,

"Fictitious."

Mr. Curran, after reading the paper, concluded the interview by ordering the two men from his office.

There is only one other thing relating to this branch of the matter to which it seems necessary to refer.

After the interviews, before mentioned, between Mr. Zainey, Mr. Samra and Mr. Crafts, which interviews we are told were simply designed to test the degree of hostility felt by Mr. Crafts, Mr. Lizotte testifies that from the reports of these two men he had learned that Mr. Crafts had made use of language indicating a well defined intention of injuring him, besides being most derogatory to his professional and private character, and that he almost immediately made use of such defamatory statements by embodying them in a

declaration which he subsequently filed in a suit for slander against Mr. Crafts. Mr. Crafts denies the utterances attributed to him, but whether the truth is with Mr. Crafts or with Mr. Zainey and Mr. Samra is not essential to our present inquiry.

- (2) These transactions of Mr. Lizotte, in which he was aided by the two men, Zainey and Samra, seem to us to present abundant evidence of his inability to understand and appreciate his professional obligations and to clearly demonstrate his unfitness for that trust and confidence which must necessarily attend the relation of attorney and client. It is incredible that Zainey and Samra, without any solicitation or intimation on the part of Mr. Lizotte and without his knowledge, should have initiated the scheme above set forth, but, be that as it may, Mr. Lizotte adopted it later, approved of its development and continuance, and accepted its results. The scheme involved the deception and humiliation of another member of the bar. It was evidently an effort to decoy Mr. Crafts into bringing charges against him of unprofessional conduct, which he thought he could easily refute, and clearly showed his willingness to practice a deception upon the bar committee.

Incidental to the prosecution of the scheme he was willing to and did advise and encourage in falsehood, misrepresentation and deceit the two men who were weak and irresponsible enough to aid him and to assist them himself with a receipt which was a written falsehood of his own.

Whether the real object of the visit of these two men to Mr. Crafts was to ascertain something regarding his attitude toward Mr. Lizotte is not, perhaps, of vital importance in the determination of this matter, but it is most singular that such should have been their only object. According to Mr. Lizotte's own testimony, Mr. Crafts had previously told him, among other things, "When I get through with you, you will be disbarred," and he also testified that he had already become satisfied that Mr. Crafts would do anything to injure him that he could. It is not important to settle

this question because it makes so little difference whether the primary object was to ascertain the position of Mr. Crafts or provoke him to utterances which might be made use of in an action for slander.

This is the third time that Mr. Lizotte has been before this court in disbarment proceedings. On July 9th, 1910, he was suspended from the practice of his profession until July 10th, 1911, for unprofessional conduct. On May 31st, 1911, his term of suspension was extended to October 10th, 1911, for holding himself out as an attorney during the period of his original suspension in disregard of the express order and decree of this court.

The utterance of this false receipt, as will appear from the comparison of dates, took place during the suspension of Mr. Lizotte, and whether or not accompanied by the statement on his part that his suspension had expired amounted to holding himself out as an attorney and to a violation of the order and decree of this court for a second time.

We now come to the consideration of the remaining complaint, numbered five. It appears that one Walter Shultz brought a suit against the Gorham Manufacturing Company to recover damages for personal injuries received through the bursting of an emery wheel. He employed Mr. Lizotte as his attorney in that matter, and Mr. Lizotte in turn secured the assistance of Mr. Crafts, who drew the declaration, interviewed the witnesses, etc. The case was settled, before the day upon which it was assigned for trial, by the payment of \$4,515. Payment was made by the check of Starkweather & Shepley, Inc., to the order of "M. L. Lizotte and A. B. Crafts, Attorneys," which check was delivered to Mr. Lizotte, who endorsed the same in strict accordance with the face thereof, that is, by writing upon the back, "M. L. Lizotte and A. B. Crafts, Attorneys." Having done this, Mr. Lizotte presented the check to Mr. Crafts for his individual endorsement, and subsequently placed his own name under that of Mr. Crafts. Mr. Lizotte then gave the check to Mr. Shultz, the plaintiff in the case, who cashed

it at the bank and returned to Mr. Lizotte with the proceeds. Some settlement between Mr. Lizotte and the plaintiff Schultz was then effected and the matter, for the time being, was closed.

There is no testimony tending to show that Mr. Lizotte, after endorsing upon said check "M. L. Lizotte and A. B. Crafts, Attorneys," made any attempt whatever to cash the same or that any attempt was made to obtain the proceeds of such check until after the individual endorsements of both had been added thereto. Although there was some wrangle between the two men as to the right of Mr. Lizotte to write the name of Mr. Crafts in the manner described, it is undisputed that Mr. Crafts added his individual name and returned the check to Mr. Lizotte.

We think that the testimony utterly fails to support that portion of the complaint which charges that the preliminary endorsement made by Mr. Lizotte was made with the fraudulent intention of depriving Mr. Crafts of his proper share of the profits and compensation arising from this suit. We think it might reasonably occur to any person receiving a check in this particular form that either of the parties named therein might make the endorsement conforming to the face of the check and afterwards obtain the individual endorsement of the other.

Mr. Crafts, in support of his claim of fraudulent intent, undertakes to show that he has not received his proper share of the profits arising out of this litigation and that an amount materially larger than he has received is due him under and by virtue of the terms of a verbal agreement between himself and Mr. Lizotte covering all business in which they might be associated. We cannot enter upon the consideration of the business relations between the two men with a view to any settlement of their accounts. If either of them is entitled to any redress against the other, such redress must be obtained by way of an action at law.

It appeared from the testimony produced at the hearing that Mr. Lizotte had assumed the management and prosecu-

tion of the Schultz case and at a later period had agreed with his client upon a compensation for legal services amounting to fifty per cent. of the sum recovered. It does not appear that such arrangement was objectionable to Schultz. He seems to have agreed to it, and his later testimony confirms such an agreement.

During the course of the hearing before the court testimony was offered to the effect that while Mr. Lizotte had received in settlement of the Schultz case the sum of \$4,515, he had represented to his client that the amount received was \$3,500, and that he had effected a settlement with him upon that basis. Originally, Mr. Shultz testified before the bar committee that Mr. Lizotte had reported to him that \$3,500 was the amount collected. Two other witnesses were produced who testified positively that Mr. Shultz had said in their presence that the gross amount obtained was \$3,500. Before the court, Shultz changed his testimony, saying, in substance, that he knew all the time that the amount collected was \$4,515, and that he was satisfied with the one-half of that sum, which he received from Mr. Lizotte. In view of the original testimony of Mr. Shultz before the bar committee, and the testimony of disinterested witnesses regarding his statements, his subsequent testimony given at the hearing does not appeal to us as being truthful. There is no satisfactory explanation for this change of attitude. There is evidence of some conversation between Shultz and Mr. Lizotte upon the subject of his testimony before the bar committee and the willingness of the former to make it satisfactory to Mr. Lizotte under certain conditions. The testimony is somewhat conflicting as to the result of such conversation. It cannot be believed that Schultz would make so absolute a change in his testimony unless some influence had been exerted upon him. The only person who would be interested in eliminating or neutralizing Schultz's former testimony would be Mr. Lizotte. It seems to us, after considering and weighing the testimony, that some such influence must have been exerted upon Schultz

either by Mr. Lizotte or by someone in his behalf and with his knowledge.

Taking the testimony in reference to the Schultz case as a whole, we feel justified in finding that Mr. Lizotte, in the outset, misrepresented to his client the amount received in settlement, and that he was later responsible for his client's change of attitude upon that question.

The reasonableness of the amount exacted by Mr. Lizotte for legal services, in the Schultz case, is a question not included in the complaint, was not raised at the hearing and has not been considered.

It was claimed at the hearing that if the testimony revealed any unprofessional conduct on the part of Mr. Lizotte, arising out of his connection with the Schultz case, that Mr. Crafts must be found to be equally guilty. We do not think that the testimony warrants such a conclusion.

It is undisputed that Schultz was a client of Mr. Lizotte and that the latter made all the arrangements with him regarding compensation and finally effected the settlement with him. If Mr. Crafts, after Mr. Lizotte had settled with his client, apparently to the latter's satisfaction, claimed an equal share with Mr. Lizotte in the proceeds of the suit, asserting that the same was due to him under a verbal agreement covering all matters in which they were associated, we do not see that Mr. Crafts' conduct in that regard would be sufficient to subject him to discipline.

We think, upon a careful consideration of the several matters set forth in these complaints or brought to our attention during the hearing, that the conduct of Mr. Lizotte has been such as to clearly demonstrate his unfitness for that trust and confidence which is the first and perhaps the most important element in the transaction of a legal business. It is, therefore, our conclusion that Mr. Lizotte should be disbarred, and an order to that effect will be entered accordingly.

Adoniram J. Cushing, for complainant.

Fitzgerald & Higgins, John J. Cosgrove, Elphege J. Daignault, for respondent.

KATHERINE A. HAYDEN vs. GERTRUDE S. HASBROUCK.

NOVEMBER 25, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Libel and Slander. Privileged Communications.*

A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains crimimatory matter, which, without this privilege would be slanderous and actionable, and this is not confined to legal duties which may be enforced, but includes moral and social duties of imperfect obligation.

(2) *Libel and Slander. Qualified Privilege.*

The defendant was the president of a central organization of women's clubs, and a member of the board of directors of one of the affiliated clubs, of which club the plaintiff was president. The defendant, owing to her position, had been requested to take action in an endeavor to stop the repetition of certain larcenies which had occurred at meetings of the organizations and had commenced an investigation into the facts. The chairman of one of the committees, with the secretary of the club, requested an interview with the defendant for the purpose of discussing the plaintiff's connection with the larcenies. At this meeting it was charged that the alleged slanderous words were spoken concerning the plaintiff:—

Held, that the meeting was upon a matter as to which they all had duties, and the circumstances made it an occasion of qualified or conditional privilege.

(3) *Libel and Slander. Privileged Communications. Malice.*

Held, further that none of the statements were volunteered by defendant, but were in reply to questions asked by those who had an interest in the matter, which circumstance alone would render the occasion a privileged one.

Held, further, that the interview being a privileged one, defendant could not be held liable for the words spoken, although the same were untrue, and in ordinary circumstances would be actionable unless in uttering them she was moved by malice toward the plaintiff, not malice in law or the absence of legal excuse, but the motive of personal spite or ill will, sometimes called express or actual malice.

(4) *Libel and Slander. Privileged Communications. Express Malice.*

Unauthorized communications which are actionable carry with them the inference of malice and a plaintiff without proof can rely upon the presumption of malice which arises from the slanderous nature of the words. But in a privileged communication, the occasion repels the inference of malice, and there arises a presumption of good faith which the plaintiff

must satisfactorily rebut. The burden of proving express malice is thrown upon the plaintiff by reason of the privilege in the defendant.

(5) *Libel and Slander. Privileged Communications. Malice.*

At an interview which was otherwise privileged, plaintiff claimed that certain statements of defendant were sufficient to support a finding of malicious motive. Defendant, speaking of the rumors affecting plaintiff, said that she had "no positive proof," and that "as far as I am concerned, I am convinced":—

Held, that such statements were pertinent to the matter, contained no intrinsic evidence of malice and were within the privilege of the occasion.

(6) *Libel and Slander. Privileged Communications. Malice.*

At such interview, in reply to the statement, "What a terrible thing for Mr. X.," defendant replied, "It is no surprise to him, he has paid her off before":—

Held, that the previous conduct of plaintiff in this regard, having a material bearing upon the weight to be given the rumors then under consideration, was fairly related to the subject of the interview, and there being no evidence it was not honestly made, furnished no evidence of malice in view of the testimony.

(7) *Libel and Slander. Privileged Communications. Malice.*

At an interview, which was otherwise privileged, in reply to a statement showing lack of motive for the alleged acts on the part of plaintiff, defendant replied, "why, they are as poor as Job's turkey." Plaintiff claimed this was an irrelevant reflection upon her, showing malice:—

Held, that parties in such a situation are not bound to absolutely legal relevancy, and the financial condition of plaintiff being regarded by the party making the statement as material to the discussion, the reply of defendant could not be regarded as entirely immaterial, and not being itself slanderous in the circumstances of the case, was insufficient to show malice.

(8) *Libel and Slander. Privileged Communications. Malice.*

The language of privileged communications is not to be subjected to too strict a scrutiny, and merely by the use of adjectives or similes, a communication otherwise privileged is not rendered malicious.

(9) *Libel and Slander. Privileged Communications. Malice.*

Privileged communications which cannot themselves form the basis for an action of slander are not admissible for the purpose of showing malice in other communications.

TRESPASS ON THE CASE for slander. Heard on exceptions of defendant and sustained.

SWEETLAND, J. This is an action of trespass on the case for slander. The declaration alleges that "at divers meet-

ings of the women's clubs to which the plaintiff and defendant belonged and at other gatherings of women held at divers dates not long before the time of the publishing of said slander at divers places in the city of Providence, various sums of money and articles of personal property had been taken from the garments and handbags and pocket-books of divers members and guests of said clubs under circumstances which indicated that such money and articles had been stolen." The facts thus alleged clearly appear in the testimony given at the trial. The declaration further alleges that in the presence of other women who knew the plaintiff the defendant was asked "if the plaintiff was suspected of having taken such money and articles," and the defendant spoke of and concerning the plaintiff, "It is only too true. As far as I am concerned, I am convinced"; and that later in the course of the same conversation when one of the other women said to the defendant, that it would be a shock to the plaintiff's husband to be told that his wife was a thief, the defendant replied, "That will be no surprise to him. He has paid her out before." To this declaration the defendant pleaded the general issue alone. The case was tried in the Superior Court before a jury and verdict was rendered for the plaintiff in the sum of eighteen hundred dollars. After the denial by the justice of the Superior Court of the defendant's motion for a new trial the case was certified to this court upon the defendant's exceptions, eighty in number, taken to rulings of the Superior Court before and at the trial, and to the decision upon said motion for a new trial. At the conclusion of the testimony, the defendant moved for the direction of a verdict in her favor, which motion was denied, and exception was taken. This exception is one of those now before us and in this opinion we will particularly discuss that exception.

What we consider to be the material facts in the case were not disputed at the trial. It appeared in testimony that at the time of the speaking by the defendant of the alleged slanderous words, on March 12th, 1909, there existed in the

State over thirty separate organizations of women known as women's clubs; that each of these clubs had a board of officers and directors; that the total membership of these clubs was over three thousand; that one of these organizations was known as the Providence Mothers' Club; that these various separate organizations were affiliated with each other in a central organization known as the Rhode Island State Federation of Women's Clubs, and that at the head of this affiliated body was an officer known as the President of the State Federation. On March 12th, 1909, and for a year previous thereto, the defendant held the office of President of the State Federation. On said March 12th, 1909, the plaintiff was the president of the Providence Mothers' Club; and one Mrs. Grieve and one Mrs. Lake were respectively the chairman of the hospitality committee and the secretary of said Providence Mothers' Club. The defendant, besides being the president of the central body, was a member of the board of directors of said Providence Mothers' Club. The taking of money and personal property from the cloak rooms of the various clubs as set out in the declaration became a matter of great concern to the officers and members of the various clubs; it appears in the testimony of one witness that a report of these occurrences was published in a newspaper. The defendant, as head of the organization, was requested by her associates to take action in an endeavor to stop the repetition of these larcenies. The defendant commenced an investigation and employed a lawyer to assist her. The defendant states that every rumor that was brought to her was connected with the plaintiff and with no other person. On March 12th, 1909, Mrs. Grieve and Mrs. Lake, aforesaid, requested and obtained from the defendant a private interview with her for the purpose of discussing the plaintiff's connection with said larcenies. It is at this meeting that the alleged slanderous words were spoken by the defendant, if spoken at all by her.

These women sought the interview with the defendant because she was the President of the State Federation. In

- opening this interview, Mrs. Grieve stated that on the day before she, as chairman of the hospitality committee of the Providence Mothers' Club, had been asked to watch the plaintiff as the person who was accused "of taking things from the Churchill House." The circumstances of this meeting made it an occasion of qualified or conditional privilege. It is a principle recognized by the courts of this
- (1) country and England that "a communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains crimimatory matter, which, without this privilege would be slanderous and actionable." The word "duty" as used cannot be confined to legal duties which may be enforced, "but must include moral and social duties of imperfect obligation." *Harrison v. Bush*, 5 El. & Bl. 344. The courts have been liberal in their view of the nature of the duty or the interest, which must exist under this rule to render a communication privileged. The following are among many which have been held to be privileged occasions or privileged communications; the publication of charges containing defamatory matter made in a meeting of Congregational ministers against one of its members, *Shurtleff v. Stevens*, 51 Vt. 501; a complaint made to a church of which the plaintiff was a member charging him with perjury, *Remington v. Congdon*, 2 Pick. 310; words spoken in good faith, within the scope of his defence, by a party on trial before a church meeting, although they disparage private character, *York v. Pease*, 2 Gray, 282; the publication of charges made before a lodge of Masons, *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384; words in themselves slanderous uttered in the presence of a conference on church discipline, *Jarvis v. Hatheway*, 3 Johns. 179; charges preferred by one member of an Odd Fellows Lodge against another member, *Streety v. Wood*, 15 Barb. 105; the letter written by a clergyman to the curate of another clergyman, charging the latter with

wrongdoing, *Whiteley v. Adams*, 15 C. B. N. S. 392. In *Clark v. Molyneux*, 3 Q. B. D. 237, Brett, L. J., said: "I am of the opinion that when the relations between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate, either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged."

- (2) In the case at bar the interview in question was not an occasion of trifling gossip, but was a serious consultation upon a matter in which they were all interested as members and officers of the associations named, and upon a matter as to which they all had duties. The exact nature of the duty of Mrs. Grieve as chairman of said committee on hospitality does not appear; but by her testimony her office required her to watch any person suspected of purloining property at club meetings. Mrs. Lake was the secretary and also a director of the Providence Mothers' Club, the defendant was a director of that club. These officers all had interests and duties with reference to the charge of moral delinquency made against the president of said club. They all had a common interest in the good reputation of the club to which they belonged, which has been held to render serious discussions, such as the one under consideration, occasions of qualified privilege. As subordinate officers the other women came to the defendant as the head of the state organization, and she had good reason to believe that they asked the questions which brought out her replies from an honest desire for information by which to regulate their conduct or to aid them in the performance of their duties. None of the statements of the defendant upon which the action is based were volunteered by her, but were in reply to questions asked by the others who had an interest in the
- (3) matter under discussion, which circumstance alone would render the occasion a privileged one.

The interview in question being a privileged one the defendant cannot be held liable for the words alleged to have

- been spoken by her, although the same were untrue and in ordinary circumstances would be actionable, unless in uttering them she was moved by malice toward the plaintiff. And the word "malice" in this connection does not mean malice in law, or the absence of legal excuse, but malice in the popular sense, the motive of personal spite or ill will.
- (4) This is sometimes called express or actual malice. Unauthorized communications which are actionable carry with them the inference of malice and the plaintiff, without proof, can rely upon the presumption of malice which arises from the slanderous nature of the words. But in a privileged communication the occasion repels the inference of malice and there arises a presumption of good faith which the plaintiff is required to satisfactorily rebut. The burden of proving express malice is thrown upon the plaintiff by reason of the privilege in the defendant.
- (5) Our attention is called to certain statements of the defendant made in the course of said interview as furnishing intrinsic evidence of ill will on her part towards the plaintiff, and also to two subsequent occasions at which, it is claimed, the defamatory charges and statements were repeated by the defendant. It is claimed that these were properly submitted to the jury as evidence of spite or ill will; and that they are sufficient to support a finding of malicious motive actuating the defendant at said interview. It was testified at the trial that the defendant, at said interview, in speaking of the rumors and suspicions against the plaintiff, said that she had "no positive proof," and further that "as far as I am concerned, I am convinced." In our opinion, these statements were clearly within the privilege of the occasion, they contain no intrinsic evidence of malice; they were pertinent to the matter under consideration; in the circumstances the defendant properly stated the standing of the case against the plaintiff as the result of her investigation; and she might properly inform her companions of her honest opinion as to the plaintiff's guilt, based upon that investigation, which would naturally furnish much more of hearsay than of

- positive proof. It is also in the testimony that at said
- (6) interview Mrs. Lake said, "What a terrible thing for Mr. Hayden," and the defendant replied, "It is no surprise to him, he has paid her off before." If this language of the defendant is interpreted to mean, as the plaintiff claims, that the plaintiff had been guilty of larceny on former occasions, it still furnishes no evidence of malice in view of the testimony. It was fairly related to the subject matter of the interview. The previous conduct of the plaintiff, in the regard stated, would have a material bearing upon the weight to be given the suspicions and rumors then under consideration. There is no testimony which indicates that this statement was not honestly made by the defendant. Upon the witness stand the defendant gave the name of the informant, upon whose information she based the statement in question; and said informant was in court at the trial. It is also strongly urged by the plaintiff as evidence of malice that at
- (7) said interview Mrs. Lake inquired, "Why, what reason could she have for doing such a thing, she has absolutely no reason for taking them, she has plenty of everything, she has all she wants and plenty of money?" and the defendant replied, "Why, they are as poor as Job's turkey." The plaintiff sees in this remark of the defendant such an irrelevant reflection upon the plaintiff, such exaggeration and violence of language as to indicate an ill will towards the plaintiff moving the defendant to speak the words declared upon in the
- (8) declaration. Merely by the use of adjectives or similes a communication otherwise privileged is not rendered malicious. People conferring as these women were in a confidential and privileged way are not rigidly bound in their talk to formal, responsive replies or to absolutely legal relevancy. The law makes allowance for differences of mental temperament and differences in habits of expression. While poverty in itself would furnish no evidence of fault or crime, Mrs. Lake regarded the financial condition of the plaintiff as material to the discussion; and the reply of the defendant to this question cannot in the circumstances be regarded as entirely immaterial.

If, upon a privileged occasion, one of the participants goes beyond the business in hand and makes an entirely irrelevant attack upon the character of the plaintiff or indulges in language regarding the plaintiff of an unreasonably violent or grossly exaggerated character, such circumstances furnish proper subjects for examination by the jury upon the question of malice. However, it is not the tendency of most courts to submit the language of privileged communications to too strict a scrutiny. Odgers on Libel and Slander, 5th edition, p. 355; *Spill v. Mæule*, L. R. 4. Ex. 232; *Somerville v. Hawkins*, 10 C. B. 583. In *Laughton v. The Bishop*, 4 L. R., P. C. A., 495, at 508, the court said, with reference to a claim that malice attached to certain statements made upon a privileged occasion: "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

The expression used by the defendant which is now under consideration was not itself slanderous in the circumstances of this case. We also find it entirely insufficient to support a verdict that the defendant was actuated by malice toward the plaintiff in speaking the words complained of in the declaration.

In her attempt to fix malice upon the defendant the plaintiff further relies upon two so-called repetitions of the language complained of. The first of these was at the home of the defendant's attorney, in the course of an interview and during the time that the defendant, Mrs. Grieve and Mrs. Lake alone were present. This meeting was also held at the request of Mrs. Grieve and Mrs. Lake that they might obtain further information in regard to the matter discussed at the previous conference. The testimony as to what occurred

at this meeting does not show any repetition of the statements previously made. The conversation related to the desire of the other women to obtain the names of the defendant's informants. This the defendant was unwilling to divulge, on the ground, as she says, that the information was given to her in confidence, because of her position as President of the State Federation, and she was not at liberty to furnish the information sought. The second of these so-called repetitions was made at a meeting of the Providence Mothers' Club, held in the Mathewson Street Church. This was a special meeting of the club called by the plaintiff herself, by virtue of her office of president, for the purpose of discussing the statements of the defendant regarding the plaintiff made at the first interview hereinbefore referred to. By direction of the plaintiff a special invitation to be present at this meeting was sent to the defendant; and in response to that invitation the defendant attended the meeting. It does not appear from the testimony that any persons were present except members of the club. At this meeting the plaintiff made a statement in regard to her conduct and called upon the defendant to reply. The defendant then read a statement in defence of her words spoken at the first interview with Mrs. Grieve and Mrs. Lake. As to neither the interview at the home of said attorney nor the meeting in said church does any intrinsic or extrinsic evidence of malice towards the plaintiff appear in the defendant's language or conduct. These are also clearly occasions of qualified privilege. Testimony as to what took place at these two meetings was admitted by the justice at the trial against the objections of the defendant. Exceptions to said rulings are included in the bill of exceptions.

The justice presiding at the trial permitted this testimony to go to the jury on the ground "that repetition of the original statement, as bearing on the question of the attitude of the person making it, bears on the question of malice," and later, in his charge, the said justice so instructed the jury. In these rulings and instructions the learned justice

was in error. This ruling permits the presumption of good faith which attaches to the original statement to be destroyed by another statement to which the presumption of good faith also attaches. It might well happen that the necessities of her position and the prosecution of her proper investigation might force this defendant into three or four or a greater number of privileged conferences similar to that held with Mrs. Grieve and Mrs. Lake. Each would be privileged; the communications made at each would be presumed to be made in good faith; and as to each, without the other, there might be no suspicion of malice; yet from a consideration of all the communications, each without malice in itself, a jury might be permitted to find malice in every one. In support of this ruling of the Superior Court the plaintiff has cited but one authority,—*Davis v. Starrett*, 97 Me. 574. We have been able to find no other. The case of *Davis v. Starrett* has been referred to in textbooks and other cases as an authority for the principle that the repetition upon a privileged occasion of words spoken at a previous privileged occasion may be shown in evidence upon the question of express malice in the defendant in his utterances at the first privileged occasion. Certain language of the Maine court in the opinion seems to warrant that view, but other observations of the court in the development of its argument appear to modify the broader general statement. The court says: "It is easily apparent that slanderous words, otherwise privileged, may be uttered in such a spirit or under such circumstances as to indicate that they themselves are the product of a hostile or malevolent disposition. If so, they certainly would have a tendency to show that in uttering some other but similar, slander, the speaker was moved by the same disposition." There will be no dissent from the proposition. If it appears that words are uttered upon a privileged occasion in a malicious spirit the speaker forfeits the privilege; the presumption of good faith is rebutted; as to him the occasion ceases to be a privileged one; and his slanderous words may be used to show a malicious motive

- (9) in his utterances upon a previous privileged occasion. That seems to be the true intent of *Davis v. Starrett*. We find the better reason and ample authority in favor of the rule that "privileged communications which cannot themselves form the basis for an action of slander are not admissible for the purpose of showing malice in other communications." *Shinglemeyer v. Wright*, 124 Mich. 230; *Watson v. Moore*, 2 Cush. 133; *McLaughlin v. Charles*, 60 Hun. 239; *Thompson v. McCready*, 194 Pa. St. 32; *Lauder v. Jones*, 13 N. D. 525.

We are of the opinion that there was no evidence of malice which justified the submission of the case to the jury. The exception to the refusal of the justice presiding to direct a verdict for the defendant is sustained.

Opportunity will be given to the plaintiff on December 2nd, 1912, to show cause why the case should not be transmitted to the Superior Court, with direction to enter judgment for the defendant for costs.

Gardner, Pirce & Thornley, Thomas F. Cooney, William A. Camfield, of counsel, for plaintiff.

P. H. Quinn, Waterman & Greenlaw, Charles E. Tilley, for defendant.

HERBO-PHOSA COMPANY vs. PHILADELPHIA CASUALTY CO.

NOVEMBER 25, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, Sweetland, and Vincent, JJ.

(1) *Liability Insurance. Loss to Plaintiff.*

Plaintiff was insured in defendant liability company, the policy being one of indemnity containing the following provision: "No action shall lie against the company, as respects any loss or expense under this policy unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after the trial of the issue."

After judgment had been recovered against plaintiff in a cause of action covered by the policy, the following steps were taken.

Plaintiff gave to the X Bank its note for the amount of the judgment debt, and received a cashier's check for the same amount, payable to it. It then endorsed the check in blank and delivered it to the attorney for the

plaintiff in the execution, who received it in satisfaction of the execution. The attorney thereupon, with the consent of his client, deposited the check in the X Bank, and received a certificate of deposit for the same sum, which certificate was then pledged as collateral security for the payment of the note in accordance with an agreement previously made with the bank by said attorney to furnish security for the payment of the note. This note was renewed at its maturity by a similar note. Plaintiff paid the interest in advance on both notes, as well as the witness fees in cash, in the original action, and also gave its note for \$300 to its president, who discounted it at a bank and paid the face of the note to plaintiff's attorney in settlement of his bill for services. Payment of the note was guaranteed the bank by said attorney. No agreement existed between any of the parties to these transactions, whereby the payment of the notes should be contingent upon any happening whatever or whereby in any contingency the plaintiff should receive any rebate or credit.

Held, that a payment by note instead of cash, if made in good faith, was sufficient, and amounted to a loss to the insured.

Held, further, that the notes constituted valid claims against the plaintiff, the agreed facts not disclosing any collusive features which could effect any modification of the liability of the indemnity company.

ACTION OF THE CASE in assumpsit. Heard on agreed statement of facts.

VINCENT, J. This is an action of the case in assumpsit against a liability insurance company to recover, under the terms of its policy, for a loss sustained by the plaintiff as defendant in an action at law, including costs and expenses.

Ann E. Congdon, administratrix upon the estate of her father, John E. Whipple, brought a suit against the Herbo-Phosa Company to recover damages for the death of said Whipple which, as alleged, was brought about by the negligence of said company, or its predecessor, the Modox Company. The Herbo-Phosa Company was insured against accident in the defendant casualty company. The casualty company having refused or failed to assume the defense of the Whipple suit, the same was defended by the Herbo-Phosa Company. The plaintiff in the Whipple suit recovered a judgment for the sum of \$2,548.95 damages and costs. Later, the Herbo-Phosa Company, claiming that it had paid the amount of this judgment and costs and that it had been put to other and further expense

in the defense thereof, requested reimbursement from the defendant casualty company for the losses thus sustained, in accordance with the terms of the policy contract. The defendant casualty company refused to comply with this request of the plaintiff on the ground that the latter had not actually suffered any loss and that its pretended payment of the judgment and costs aforesaid was nothing more than a mere subterfuge designed, in collusion with other parties in interest, for the purpose of enabling the Herbo-Phosa Company to avoid the terms of the policy providing only for indemnity against actual loss, and therefore, that until there had been a *bona fide* payment of the amount of the said judgment and costs, the casualty company was under no obligation to pay anything to its insured.

The case comes before the court on certification of the Superior Court, under the provisions of Section 4, Chapter 298 of the General Laws, upon the following agreed statement of facts.

"1. That the defendant issued to the plaintiff the policy of insurance as set forth in the declaration.

"2. That the accident to John E. Whipple happened as set forth in the declaration and was covered by the policy.

"3. That Ann E. Congdon, administratrix of said John E. Whipple by Lewis A. Waterman, attorney, brought suit against the plaintiff in the case at bar on account of said accident as set forth in the declaration and recovered judgment therein against said plaintiff in the case at bar on the sixth day of May, 1911, as of April fourth, 1911, for the sum of Twenty-five Hundred (\$2500) Dollars damages and Forty-eight Dollars and Ninety-five Cents (\$48.95) costs; that execution upon said judgment was issued from the Superior Court on the ninth day of May, 1911, for the sum of Twenty-five Hundred and Forty-eight Dollars and Ninety-five Cents (\$2,548.95) judgment and costs, together with Fifteen Dollars and Twenty-nine Cents (\$15.29) interest thereon, amounting in the whole to Two Thousand Five

Hundred and Sixty-four Dollars and Twenty-four Cents (\$2,564.24).

"4. That said execution was returned to the Superior Court on February seventeenth, 1912, with the following indorsement thereon:

" "Having received full payment and satisfaction of the within execution the same is hereby cancelled and discharged.

" "Providence, May 17, 1911.

" "WATERMAN, CURRAN & HUNT,

" "*Plaintiff's Attorneys.*"

"5. That on the seventeenth day of May, 1911, the Herbo-Phosa Company gave to the Westminster Bank of Providence, Rhode Island, the note of said Herbo-Phosa Company for Two Thousand Five Hundred and Sixty-four Dollars and Twenty-four Cents (\$2,564.24), payable six (6) months after date, of which the following is a copy:

"\$2564.24 PROVIDENCE, R. I., May 17, 1911.

"Six months after date, with interest at the rate of 5½ per cent. per annum, for value received, we promise to pay to Westminster Bank, or order at said Bank, in the City of Providence, Twenty five hundred sixty-four 24-100 Dollars, having deposited herewith and pledged as COLLATERAL SECURITY for the payment hereof;—

Certif. of Deposit Westminster Bank

No. 814—

with authority to sell the same, or any part thereof, or any collaterals substituted for or added to the above, without notice, either at public or private sale or otherwise, at the option, of the holder, on the non-performance of this promise, the said holder applying the net proceeds to the payment of this note and accounting to for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against held by said holder, whether now due or to become due, or hereafter to be contracted. Should the market value of any security pledged

for this loan, in the judgment of the holder thereof, decline, hereby agree to deposit on demand (which may be made by a notice in writing sent by mail or otherwise to residence or place of business) additional collateral, so that the market value shall always be at least per cent. more than the amount of this note; and failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything herein expressed to the contrary notwithstanding, and the holder or holders hereof may immediately reimburse themselves by the sale of the security, or any part thereof; and it is hereby agreed that the holder or holders of this note, or any person in his or their behalf, may purchase at any such sale discharged from any right of redemption. Authority is hereby given, to use, transfer or hypothecate any of the collaterals hereby pledged at holder's option, said holder being required on tender of the amount loaned and interest, to return an equal quantity of said collateral and not the specific collateral hypothecated.

"HERBO-PHOSA CO.

"JAMES S. BARRY,

Pres. & Mgr.

"BYRON A. REMINGTON,

Treas.

"That thereupon the Herbo-Phosa Company received from the Westminster Bank a cashier's check of said bank for Two Thousand Five Hundred and Sixty-four Dollars and Twenty-four Cents (\$2,564.24), payable to the Herbo-Phosa Company; that thereupon the Herbo-Phosa Company endorsed said check in blank and delivered same to Lewis A. Waterman as attorney for said Ann E. Congdon, administratrix of John E. Whipple, and the same was received by said Lewis A. Waterman, as attorney as aforesaid, in full payment and satisfaction of the judgment and execution described in Paragraphs 3 and 4 above; that thereupon said Lewis A. Waterman, said Ann E. Congdon, administratrix assenting thereto, deposited said cashier's check in said

Westminster Bank and received from said bank a certificate of deposit in said bank for the same sum as the face value of said cashier's check, which certificate of deposit was immediately deposited with said note of the Herbo-Phosa Company in said Westminster Bank and pledged to said bank as collateral security for the payment of said note, in accordance with an agreement made by said Lewis A. Waterman with said bank before any part of the above described transaction with said bank was entered upon to furnish security for the payment of said note; that all the above described in this paragraph occurred at one and the same visit of the parties aforesaid at said Westminster Bank, on the 17th day of May, 1911.

"6. That at the time of the transactions described in Paragraph 5 above, the financial condition of the Herbo-Phosa Company was not such as to enable it to meet immediately all its due financial obligations, that it did not have the money to pay said judgment and that its credit was not such as to enable it to borrow money without security.

"7. That the Lewis A. Waterman last mentioned is the same person who is hereinbefore described as attorney for Ann E. Congdon, administratrix, in said case against the Herbo-Phosa Company, and is also one of the attorneys for the plaintiff in the case at bar.

"8. That on May seventeenth, 1911, the Herbo-Phosa Company gave its check upon its account in the Industrial Trust Company, payable to the Westminster Bank for the sum of Seventy-two Dollars and Eight Cents (\$72.08), which check was given and was received by the Westminster Bank as full payment of the interest on said note of Herbo-Phosa Company for Two Thousand Five Hundred and Sixty-four Dollars and Twenty-four Cents (\$2,564.24), dated May seventeenth, 1911, up to the time of the maturity of said note and upon presentation said check was duly honored and paid.

"9. That at the maturity of said note, the Herbo-Phosa Company gave to the Westminster Bank a renewal note, payable six (6) months after date for the same amount upon

the same security and containing in all other respects the same terms and conditions and upon the same terms and conditions as the said original note, and thereupon said original note was marked 'Paid' by said Westminster Bank and by it surrendered to said Herbo-Phosa Company.

"10. That on November twenty-first, 1911, the Herbo-Phosa Company gave its check upon its account in the Industrial Trust Company, payable at the Westminster Bank for the sum of Seventy-one Dollars and Thirty Cents (\$71.30), which check was given and was received by the Westminster Bank as full payment of the interest on said renewal note up to the time of the maturity of said renewal note, and upon presentation said check was duly honored and paid.

"11. That said renewal note for Two Thousand Five Hundred and Sixty-four Dollars and Twenty-four Cents (\$2,564.24) of said Herbo-Phosa Company is now held by said Westminster Bank; that it is not yet due and that no part thereof has been paid.

"12. That the following are copies of stubs in the Note Book of the Herbo-Phosa Company:

\$2564.24

Date May 17, 1911

To West. Bank

5½% Int.

Time

Acct. of Congdon Suit

No.

6 mos. note

Date Nov. 17, 1911

To Westminster Bank

5½% Int.

Time 6 mos.

Acct. of Congdon Suit

No.

\$300. 00-100
 Date May 17, 1911
 To Alfred S. Johnson
 Time 6 mos.
 Acct. of Congdon Case
 No.

\$300. 00-100
 Date Nov. 17, 1911
 To Alfred S. Johnson
 Mechanics Nat. Bank
 Time 6 mos.
 Acct. of Congdon Case
 No.

“That the following are copies of the entries in the book of Bills Payable, containing the record of the notes made by the Herbo-Phosa Company:

<i>Date</i>	<i>By Whom Drawn</i>	<i>Where Payable</i>	<i>On What Account</i>
May 17 '11	Herbo-Phosa Co.	Westminster Bank	Congdon Case.
<i>Time</i>	<i>Amount</i>	<i>When Due</i>	<i>Remarks</i>
6 mos.	\$2564.24	Nov. 17 '11	Renewed Nov. 17, 1911.

<i>Date</i>	<i>By Whom Drawn</i>	<i>Where Payable</i>	<i>On What Account</i>
May 17 '11	Herbo-Phosa Company	Mechanics Nat.	Congdon Case.
<i>Time</i>	<i>Amount</i>	<i>When Due</i>	<i>Remarks</i>
6 mos.	300.00	Nov. 17 '11	Renewed Nov. 17, 1911.

<i>Date</i>	<i>By Whom Drawn</i>	<i>Where Payable</i>	<i>On What Account</i>
Nov. 17, 1911	Herbo-Phosa Co.	Westminster Bank	Congdon Case.
<i>Time</i>	<i>Amount</i>	<i>When Due</i>	
6 mos.	\$2,564.24	May 17, '12.	

<i>Date</i>	<i>By Whom Drawn</i>	<i>Where Payable</i>	<i>On What Account</i>
Nov. 17, 1911	Herbo-Phosa Co.	Mechanics National	Congdon Case.
<i>Time</i>	<i>Amount</i>	<i>When Due</i>	
6 mos.	\$300.00	May 12, '12.	

"There was also a record made of the payment of interest upon both the principal and renewal notes in the regular books of the Company, viz: the Cash Book, Petty Ledger and Check Book.

"There is no record of the receipt by the Herbo-Phosa Company of the proceeds of said note for \$2,564.24, dated May 17, 1911, or of payment of the proceeds or any part thereof to any person, or of the receipt by the Herbo-Phosa Company of the proceeds of said note for \$300, dated May 17, 1911, or of payment of the proceeds or any part thereof to any person upon the books of the Herbo-Phosa Company, or any other record except as above stated of the transactions described in this agreed statement of facts upon the books of the Herbo-Phosa Company.

"That said note for \$300 and the renewal thereof is the note hereafter referred to in Paragraph No. 17.

"There is also no record upon any of the books of the Herbo-Phosa Company of any claim on the part of said Ann E. Congdon, as Administratrix as aforesaid, or of any judgment being obtained upon said claim against the Herbo-Phosa Company. This is the first tort action that the Herbo-Phosa Company has ever had and the only judgment that has ever been obtained against it in any tort action.

"13. That said certificate of deposit No. 814, unchanged and with the consent of said Lewis A. Waterman and said Ann E. Congdon, the administratrix of John E. Whipple aforesaid, still remains on deposit with the Westminster Bank, pledged as collateral security for the payment of said renewal note.

"14. That, except as set forth, no payment of the judgment aforesaid or satisfaction of the execution thereon has been made.

"15. That there has not been and that there does not now exist any agreement or understanding between the Herbo-Phosa Company, the Westminster Bank, Lewis A. Waterman, individually or as attorney for any person, Ann E. Congdon, administratrix as aforesaid, or either of them,

or any person on behalf of them, or any of them whereby the payment in full or in part thereof of said notes or renewal of them or substituted obligation for them by the Herbo-Phosa Company shall be contingent upon any happening whatever, or whereby in any contingency the Herbo-Phosa Company shall receive any rebate, discount, payment back or credit on account of said transaction.

"16. That the Herbo-Phosa Company paid in cash Seven Dollars and Seventy Cents (\$7.70) for witness fees in defending the action of Ann E. Congdon, Administratrix, against it as aforesaid.

"17. That Alfred S. Johnson and Arthur P. Johnson were employed by the Herbo-Phosa Company, attorneys at law to defend the action of Ann E. Congdon, administratrix, against it as aforesaid; that said Alfred S. Johnson and Arthur P. Johnson rendered to the Herbo-Phosa Company a bill for \$300 for their services therefor, which was a reasonable amount for the services rendered; that on May 17, 1911, the Herbo-Phosa Company, by James S. Barry, its President and Manager, and Byron A. Remington, its Treasurer, made its note for Three Hundred (\$300) Dollars, payable to said James S. Barry six months after date; said James S. Barry endorsed said note and delivered it to the Mechanics' National Bank and received therefor from said bank the sum of Three Hundred (\$300) Dollars in cash, which he paid to said Alfred S. and Arthur P. Johnson, and the said Alfred S. Johnson and Arthur P. Johnson received as full payment for their services to the Herbo-Phosa Company aforesaid; that said Alfred S. Johnson guaranteed to the Mechanics' National Bank the payment of said note; that at the maturity of said note it was paid by a renewal note of like tenor in all respects due six months thereafter and payment thereof guaranteed to said bank by said Alfred S. Johnson in same manner as in case of the original note; that without such or other adequate security, the Mechanics' National Bank would not have taken said note and the renewal thereof and paid over cash upon it as aforesaid; that said renewal note

is not yet due, is unpaid, and that there has not been at any time and is not now any understanding or agreement between the Herbo-Phosa Company, the Mechanics' National Bank or said Alfred S. and Arthur P. Johnson, or either of them, whereby the payment in full or in part of said notes or renewal of them or substituted obligations for them by the Herbo-Phosa Company, shall be contingent upon any happening whatever or whereby in any contingency the Herbo-Phosa Company shall receive any rebate, discount, payment back or credit on account of said transaction.

"18. That the right of the Herbo-Phosa Company to recover in the case at bar against the Philadelphia Casualty Company the whole or any part of the amounts claimed in the declaration in said case shall depend solely upon whether the Herbo-Phosa Company has complied with the following provision of the policy:

"No action shall lie against the company as respects any loss or expense under this policy unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after trial of the issue.

"HERBO-PHOSA COMPANY

"*By Lewis A. Waterman*

"*Alfred S. & Arthur P. Johnson, Attys.*

"PHILADELPHIA CASUALTY COMPANY

"*By Greenough, Easton & Cross, Attys.*"

- (1) The policy issued by the defendant company is undoubtedly one of indemnity under which a payment by the insured is a necessary condition precedent to recovery.

The defendant's policy also contains the provision that "No action shall lie against the company as respects any loss or expense under this policy unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after the trial of the issue."

The courts have held that a payment in cash is not necessary, and may be otherwise made, as for instance by a

note, provided that the judgment against the insured is extinguished, and the transaction is in good faith. In fact, the two cases relied upon by the defendant in its brief, *Kennedy v. Fidelity & Casualty Company*, 110 N. W. 97, and *Stenbohm v. Brown-Corliss Engine Company*, 119 N. W. 308, fully recognize the principle that a payment by note, if done in good faith, is sufficient, and amounts to a loss to the insured. In the case of *Stenbohm v. Brown-Corliss Engine Company*, the defendant was adjudged a bankrupt, and a receiver in bankruptcy was duly appointed subsequent to the commencement of the suit, and before it had been carried to judgment. The claim could not be proven in bankruptcy before judgment thereon was obtained, and when the judgment was rendered, the time within which it might have been filed in the bankruptcy proceedings had expired. After the rendition of judgment, an execution was issued and returned unsatisfied, whereupon proceedings being instituted, a receiver of the Brown-Corliss Co. was appointed by a circuit court commissioner. The receiver then filed a petition in the bankruptcy court, and obtained an order upon the trustee in bankruptcy, to turn over to him, the indemnity policy. Then the receiver, upon a petition to the circuit court, representing that the plaintiff was ready and willing to compromise for \$5,000, and would accept the receiver's promissory note for that sum in settlement of the judgment, obtained an *ex parte* order, directing the receiver to make the note, and begin a suit against the insurance company. After such suit had been commenced on the policy, the Brown-Corliss Company obtained an order vacating the former *ex parte* order, and from this last vacating order, an appeal was taken. The action of the lower court was affirmed. The appellate court says in its opinion, that a judgment may be properly satisfied otherwise than by a payment in money, provided such payment is made and accepted in good faith. The court, however, found that the whole proceeding was a mere subterfuge, resorted to for the purpose of making a nominal compliance with the terms of the insurance contract.

We think that the case at bar may be readily distinguished from the *Brown-Corliss Company* case. In the latter, the receiver was not appointed to administer the affairs of the insolvent corporation for the benefit of its creditors generally, but simply in aid of an execution in favor of a single creditor for the sole purpose of collecting the judgment. The assets of the Brown-Corliss Company, with the exception of the insurance policy, were all in the hands of the trustee in bankruptcy, and the policy was of no value to the Brown-Corliss Company until the judgment was satisfied. The receiver, as such, was not invested with any property formerly of the Brown-Corliss Company. The note was not discounted, but was simply a valueless piece of paper turned over to the plaintiff in the damage suit in satisfaction, as it was claimed, of his judgment.

In the case at bar, the Herbo-Phosa Company made its note, in an amount sufficient to pay the judgment and costs, which said note was discounted at the bank. Such procedure on the part of the plaintiff company, unattended by other circumstances, would come within the ordinary course of business. The discounting of its note for this purpose would not tend to prove the insolvency of the Herbo-Phosa Company, but would as readily indicate that the company was at the time without the ready money with which to pay the judgment.

The defendant, however, claims that the circumstances attending the making and discounting of the plaintiff's note, which are fully recited in the agreed statement of facts, are sufficient to stamp the whole transaction as a subterfuge wholly designed to avoid the terms of the policy, and that the case therefore comes within the law as laid down in *Stenbohm v. Brown-Corliss Engine Company*. So far as it appears by the facts presented to the court, the note in question constitutes a valid claim against the plaintiff company. While it might be contended, by way of argument, that the method of arranging this whole matter was only consistent with some pre-arranged plan to avoid the terms of

the policy, yet, the pith of the question is in the validity of the note as a claim legally collectible from the Herbo-Phosa Company. The parties agree in their statement of facts "that there has not been at any time and is not now any understanding or agreement between the Herbo-Phosa Company, the Mechanics' National Bank or said Alfred S. and Arthur P. Johnson, or either of them, whereby the payment in full or in part of said notes or renewal of them or substituted obligations for them by the Herbo-Phosa Company, shall be contingent upon any happening whatever or whereby in any contingency the Herbo-Phosa Company shall receive any rebate, discount, payment back or credit on account of said transaction." The judgment in the Whipple case has been paid and the execution therein returned satisfied.

The note for \$2,564.24 given to the Mechanics' Bank and the note for \$300 covering the legal services of Alfred S. and Arthur P. Johnson in defending the Whipple suit, have both been renewed and the interest paid by the Herbo-Phosa Company.

These notes, so far as appears, are valid claims against the Herbo-Phosa Company, and the agreed facts above quoted serve to strip the transaction of any collusive feature which could effect any modification of its liability thereon. We think that the plaintiff is entitled to recover of the defendant the amount of the judgment and costs which it has paid, together with the counsel fees incurred in the defense of the suit and interest from the date of payment. There is no dispute between the parties as to the amount of the plaintiff's claim.

Decision for the plaintiff for \$3,132.80 and costs. The papers in the case are remitted to the Superior Court, with direction to enter judgment for the plaintiff in accordance with such decision.

Alfred S. & Arthur P. Johnson, Waterman & Greenlaw, Charles E. Tilley, for plaintiff.

Greenough, Easton & Cross, Frank T. Easton, of counsel, for defendant.

MAY STIMSON vs. SWANTON C. WHITMORE.

DECEMBER 6, 1912.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Master and Servant. Due Care. "Simple Tools." Latent Defects.*

A declaration alleging that a master failed to keep in repair, certain appliances furnished the servant, in that a stool used by the servant to step upon, toppled over, caused by the insecure fastening of the stool to its legs, which connections were concealed from view, and not obvious to the plaintiff without a special inspection, states a cause of action, since the stool, as described in the declaration, cannot be said to be an appliance so simple, that the master was under no duty to inspect or to keep the same in safe condition for use.

Upon the facts as alleged, the case is not one where it appears upon the declaration that plaintiff could not have been in the exercise of due care, or that if she had used her senses, she must have known of the danger complained of.

(2) *Master and Servant. Due Care. "Simple Tools." Latent Defects.*

A servant assumes the risk of injury from dangers and defects which are so patent and obvious, that he either knows or in the exercise of ordinary care, should know of their existence, but he is under no primary obligation to investigate for latent defects, and test the fitness and safety of the place, fixtures and appliances provided by the master, but he may rely upon the obligation resting on the master to exercise reasonable care to see that they are fit and safe.

(3) *Master and Servant. Due Care. "Simple Tools." Latent Defects.*

It does not follow that because an appliance is a simple one, the master is therefore relieved of all obligation as to care for its safety for use by his employes, or that the risk must be presumed to have been assumed by the servant. In any case the relative simplicity of the appliance, and all the circumstances of the case must be taken into consideration. The case may be so plain that but one conclusion can properly be drawn, or it may be such as under the facts disclosed to require its submission to a jury.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and sustained.

JOHNSON, J. This is an action of trespass on the case for negligence, wherein the plaintiff sues for permanent injuries received by her, while in the employ of the defendant, such injuries being caused by the breaking or collapsing of a

stool, furnished by the defendant to his employes among other fixtures, appliances and apparatus, means and instruments, which he used in his business of retail shoe dealer.

The plaintiff's amended declaration is in two counts. The first count avers, among other things, that it was the duty of the defendant to keep and maintain in safe and reasonable repair, the fixtures, appliances, apparatus, means and instruments with which he carried on his said business, so that the plaintiff, while in the exercise of due care, and while engaged in performing the duties of her employment, should not be injured. It then alleges that among such instruments and appliances furnished the plaintiff, were certain stools to step upon for the purpose of reaching shoes and boxes of shoes, which could not be reached from the floor. The declaration further avers that said stools consisted of a horizontal top, and that one side consisted of a board extending slantingly downward from said top at an angle of, to wit, forty-five degrees; and further, that the legs of said stools were situated underneath said stools, some
(1) attached to the horizontal top, and one or more to the slanting side.

"And the plaintiff further avers that the legs of said stools were held in place and tightened by means of a screw or screws underneath said stools as aforesaid, so that the connections of the same were concealed from view, and not obvious to the plaintiff without a special inspection."

The declaration goes on to state that one of the stools, and especially the connections of the legs thereon with the body of the same, was permitted to become worn and out of repair, and unsafe for use, which the defendant knew, or by the exercise of reasonable care could have known, and which the plaintiff did not know and could not have known, by the exercise of reasonable care; that on the 2nd day of February, 1911, while in the exercise of due care, and while standing upon one of said stools furnished by the defendant, the stool toppled over, throwing her to the ground and seriously injuring her, caused by insecure fastening of the stool to its legs.

The second count sets forth practically the same facts, but alleges a duty of inspection.

To this amended declaration the defendant demurred:

First: Because it does not appear in said counts that the plaintiff could not, in the exercise of reasonable diligence, have known that the stool and the connections of its legs were worn, out of repair, and unsafe, before she placed herself upon said stool.

Second: Because it appears in and by said counts, that the plaintiff had an equal opportunity with the defendant of knowing of the condition of said stool and its legs.

Third: Because it appears in and by said counts that the plaintiff was not in the exercise of due care.

Fourth: Because each of said counts fails to state a cause of action.

The case was heard on the 7th day of February, 1912, before a justice of the Superior Court on the demurrer to the defendant's amended declaration, and said demurrer was sustained. The plaintiff excepted thereto, and the case is now before this court on the plaintiff's bill of exceptions, the only exception relied upon being to the decision sustaining said demurrer.

The plaintiff's counsel contend that the alleged defective condition of the stool was necessarily hidden by reason of its peculiar construction, as set forth in the declaration, calling attention to the averments, that the connections of the legs with the seat of the stool were hidden from view; and were not obvious to the plaintiff without a special inspection, and argue that a servant is not deemed to have notice of or assume the risks of such defects as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger.

- (2) The rule is stated in 26 Cyc. 1213, as follows: "A person assumes the risk of injury from dangers and defects which are so patent and obvious, that he either knew, or in the exercise of ordinary care should have known, of their existence. On the other hand, a servant is under no primary

obligation to investigate for latent defects and test the fitness and safety of the place, fixtures, or appliances provided him by the master. He has a right to rely upon the obligation resting upon the master to exercise reasonable care to see that they are fit and safe; and, although the circumstances may be such that a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as in the exercise of ordinary care he ought to have knowledge of, he is not to be deemed as having notice, or as assuming the risks, of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger."

Among the cases cited is *Whipple v. N. Y., N. H. & H. R. R. Co.*, 19 R. I. 587, where the plaintiff, a brakeman, was injured while climbing the side of a car, by reason of the proximity of a telegraph pole to the track. The court, pp. 591, 592, says: "It is urged that if the proximity of the pole to the track, which made it dangerous, was not sufficiently obvious to the plaintiff to put him on his guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable care, and hence that it cannot be held that the defendant was negligent in maintaining the pole in its position. But the answer is that the officers of the defendant located the pole; that it was their duty to have so located it as to make it safe; and, consequently, that if they failed in that respect, the defendant must be held chargeable for their default.

"The defendant further contends that the plaintiff was guilty of contributory negligence in attempting to climb the ladder of the car while the train was in motion, without looking to see whether he was in danger from the pole, instead of climbing to the top of the car before giving the signal to the engineer to go ahead, or remaining on the foot-board of the tender until the car had passed the pole. But if the dangerous proximity of the pole to the track was not so obvious as to be discoverable by observation, and the

plaintiff had no notice of the danger, we do not think that it can be held, as a matter of law, that he was guilty of negligence in not looking forward to see whether he was in danger from the pole before starting to climb the ladder."

In *Wrisley Co. v. Burke*, 203 Ill. 250, the court, p. 257, says: "The servant is under no primary obligation to investigate for latent defects and test the fitness and safety of the place, fixtures or appliances provided him by the master. He may assume that they are fit and safe, and though the circumstances may be such, a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as in the exercise of ordinary care, he ought to have knowledge of, the servant is not to be deemed as having notice or knowledge of such defects and insufficiencies, as can be ascertained only by investigation and inspection, for the purpose of ascertaining that there is no danger." See, also, *Armour v. Brageau*, 191 Ill. 117; *Greene v. Sansom*, 41 Fla. 94; *Murphy v. Marston Coal Co.* 183 Mass. 385; *Adams Express Co. v. Smith*, 24 Ky. L. R. 1915; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367 (affirmed in 197 Ill. 186).

Counsel for defendant further argue that the stool was an appliance of such simple character, that the employer is not liable for an injury to an employe, using it, due to its obviously defective condition. Counsel cite, *inter alia*, *Sheridan v. Gorham Mfg. Co.* 28 R. I. 256. In that case the allegation was "that the ladder which the defendant provided and gave to the plaintiff was unsafe and defective, in that certain iron points, or spurs, with which said ladder was equipped at its lower ends, had become dull and smooth, so that said ladder while in use was likely to slip on the floor; and that while plaintiff in using said ladder was standing on one of its rounds, said ladder slipped and precipitated the plaintiff to the floor, thereby injuring him." The plaintiff in that case contended that, inasmuch as he had alleged in his declaration that he was in the exercise of due care, and had no knowledge of the danger of slipping incident to the

use of the ladder, he had tendered proper issues of fact upon these points, and that his declaration was not, for that reason, demurrable. The court held *contra*, citing, *inter alia*, *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430. In that case, the court p. 433, said: "The plaintiff's declaration in effect in so far as it states the condition of things existing at the time of the accident, comes to this, *viz*: That there were certain large vats in the defendant's brewery which were so situated as to leave an open space underneath, between them and the floor, of about thirteen inches, which vats rested on supports through or between which there was an opening into said space. That no machine or implement occupied any part of said space, and no pitfall or defect of any sort existed therein, but that it was simply an open space, with a floor beneath and the vats above, supported as aforesaid, and that the plaintiff, being ordered to clean out said space, crawled through the opening leading thereto, and, while working therein, became wedged and bound as aforesaid," and at p. 435,—“The plaintiff further argues that the allegation in the declaration that he was in the exercise of due care, is sufficient to rebut the claim made by defendant, that plaintiff assumed the risk. We do not think so. The court must take the declaration in a case of this sort as a whole in determining whether it states a case; and if it appears from all the facts stated therein that the plaintiff could not have been in the exercise of due care, the mere fact that it alleges that he was does not save it from being demurrable. We may also add that we do not

- (3) agree with the plaintiff's contention that the allegations of lack of knowledge of the work, and the location, and lack of warning regarding the same, prohibit the assumption that the danger was obvious and that the plaintiff assumed the risk. When it is apparent, from the facts stated in a case of this sort, that if the plaintiff had used his senses he must have known of the danger complained of, no allegations which he may incorporate in his declaration as to lack of knowledge, lack of warning, or duty of the master will be

allowed to overcome and rebut said facts and render the declaration sustainable. Such a declaration is inconsistent and therefore demurrable."

It does not however necessarily follow that, because the appliance involved in a case is a simple one, the master is therefore *ipso facto* relieved of all obligation as to care for its safety for use by his employes, or that the risk must be presumed to have been assumed by the servant. In each of the cases last mentioned, the simplicity of the appliance was clear. In any case under consideration, the relative simplicity of the appliance, and all the circumstances of the case, must be taken into consideration. The case may be so plain, that but one conclusion can properly be drawn, as in the cases last mentioned, or it may be such as, under the facts disclosed, to require its submission to the jury.

In the note to *Vanderpool v. Partridge* (Neb. 1907), 13 L. R. A. (N. S.) 668, the annotator gives the rule as to the liability of the master for injury by defect in common tools thus: "The rule of *respondet superior* rests upon the assumption that the employer has a better and more comprehensive knowledge than the employe, and therefore ceases to be applicable where the employe's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool, the defect in which is the cause of the injury is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto.

"The mere simplicity of a tool, as is apparent upon consideration of the basis above stated of the rule of *respondet superior*, will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence, and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise,

are factors of varying importance, which must also be taken into account."

In *Williams v. Garbutt Lumber Co.*, 132 Ga. 230, 231, the court says: "While in a number of cases, in dealing with the particular facts involved, it has been held that the tool then being used (such as a stick with which to push cars, an ordinary hammer, or the like) was so simple in its character that the servant had at least equal opportunity with the master for observing it, and that he was at fault for not doing so, or that the master could not be charged with negligence as a matter of law for not inspecting it, and that therefore in such cases there could be no recovery, no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At last the duty of the master must necessarily to some extent depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use, and under which it is used. The underlying principle, rather than the name of the tool, is the important matter." . . .

"We do not find it necessary in this State to adopt any arbitrary rule as to tools bearing certain names, or described somewhat indefinitely as 'simple tools.' If what is called the 'simple-tool rule' is based on the principle of equality or superiority of opportunity for knowledge on the part of a servant, that principle forms a part of the test applied by our Civil Code (§§2611, 2612) in a suit against a master by a servant for an injury claimed to have arisen from the negligence of the master in failing to comply with the duties imposed on him in regard to machinery, and which, as already seen, has been held to apply in principle to cases arising from defective tools. The application of the rule that it must appear that the master knew or ought to have known of

the defect or danger, and that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof, to the facts of the particular case under investigation will furnish a solution of the question of liability or non-liability. In the determination of each case, the nature, character, and simplicity or complexity of the tool is, of course, an important factor for consideration. The case may be so plain, on the pleadings or evidence, that but one conclusion can legitimately be drawn, as in decisions of this court cited below; or it may be of such a character as, under the facts disclosed, requires submission to the jury."

In our opinion the stool as described in the declaration in the case at bar, cannot be said to be an appliance so simple that the master was under no duty to inspect, or to keep the same in safe condition for use by the plaintiff.

Applying to this case the test applied in the *Baumler* case, we cannot say that it appears from the facts stated in the declaration, that the plaintiff could not have been in the exercise of due care; or that it is apparent from the allegations of said declaration that if the plaintiff had used her senses, she must have known of the danger complained of. The evidence when introduced may or may not make out a case upon which the plaintiff can recover, but in our opinion it cannot be said that the allegations of the declaration fail to state a case upon which a recovery may be had.

Our conclusion is that the decision of the Superior Court sustaining the demurrer was error.

The plaintiff's exception to said decision is sustained, and the case is remitted to the Superior Court, with direction to overrule the demurrer and for further proceedings.

Bassett & Raymond, for plaintiff, *R. W. Richmond*, of counsel.

Boss & Barnefield, for defendant.

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ABANDONMENT.

See SCHOOLS AND SCHOOL DISTRICTS, 1.

ABATEMENT AND REVIVAL.

1. During the pendency of an action against defendant as town treasurer, defendant was re-elected, but resigned and a new treasurer was elected by the town council. Over a year from the qualification of latter, he was summoned in to answer the case and entered a general appearance. Subsequently on motion the case was dismissed under Gen. Laws, 1909, cap. 283, § 13, providing that no action pending against any officer in his capacity as such shall abate in consequence of his ceasing to hold his office within one year thereafter, but at any time within such year his successor may be summoned in to defend such action.

Held, properly dismissed.

Saunders vs. Pendleton, 19 R. I. 659, affirmed. *Tourjee v. Matteson*, 270.

2. Under Gen. Laws, 1909, cap. 283, § 13, suits against an officer become dormant upon his death or ceasing to hold office, subject to be revived at any time within a year thereafter, but in case no successor enters appearance within the year the suit abates by operation of law, and having abated can not be revived. Therefore the questions of general appearance and waiver have no application. *Tourjee v. Matteson*, 270.

ACCEPTANCE.

See CONTRACTS, 3.

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ACTIONS.

1. A demand indivisible in its nature, cannot be split so as to authorize several actions for the same claim, and if a recovery is had of a part of such a demand it will be regarded as an election to accept that part for the whole.
2. In the absence of special circumstances, an open or continuous running account between the same parties, constitutes a single and entire demand which is not susceptible of division, the aggregate of all the items being

regarded as the amount due and it cannot be severed for the purpose of bringing different suits on its different parts. *Potter v. Harvey*, 71.

OF ASSUMPSIT: See WORK AND LABOR, 1-3.

OF COVENANT: See PLEADING, 1-7.

OF TRESPASS: See ASSAULT AND BATTERY, 1-2; HIGHWAYS, 2.

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FOR MONEY LOANED: See EVIDENCE, 4-7; PARENT AND CHILD, 4.

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ADVERSE POSSESSION.

1. Claimant and her ancestors in title for a period exceeding the statutory requirement had exercised dominion over the land in controversy, which was a lot extending to the water; had from time to time filled in the shore front and cultivated the grass:—

Held, that such acts were from their nature and extent sufficiently obvious to operate as a notice to others claiming an interest in the land and were as continuous as the care and character of the land demanded. *Dodge v. Lavin*, 409.

2. A claim of title by adverse possession involves a mixed question of law and fact, and the court must determine first whether or not the party claiming title has satisfactorily proven the several acts relied upon by him as showing the exercise of dominion over the land, and then having found such acts established, whether they are sufficient in law to create a title.
3. Where it appeared that the acts of ownership of one claiming title by adverse possession, embraced everything that the nature of the premises would naturally demand and were sufficiently continuous and of such a character as would acquaint the owner had he visited the place that claimant was dealing with it as his own, the passing over the premises of persons for accommodation and without any apparent claim of right, would not affect the claim to exclusive possession on the part of claimant.
4. Where a person through mistake as to the boundary line, takes possession of land belonging to another, believing it to be his own, the holding is adverse and if continued for the requisite period, will give title by adverse possession.
5. Upon the question of title by adverse possession of a strip of land extending to the water, where claimant had from time to time filled in the shore front and cultivated the grass, considering the character of the land and the purposes for which it was adapted and all other circumstances:

Held, that claimant not only claimed title to the whole strip, but that her acts assertive of ownership were sufficient to fairly indicate to others that her claim extended to the whole. *Dodge v. Lavin*, 514.

AMENDMENT.

1. Amendments permitted by statute to pleadings do not include such amendment as would make one suit into another of a different form or for a different cause of action. *Carney v. Hawkins*, 297.

See EXECUTORS AND ADMINISTRATORS, 10.

APPEAL AND ERROR.

1. The court cannot pass upon the exclusion of a deposition, where the deposition does not appear as an exhibit and the court is not informed as to its contents. *Messier v. Messier*, 233.
2. In an action by a son against his mother for services, the admission of the bill of complaint and the opinion of the court thereon, in an equity case between the parties wherein the court decided that the mother did not agree to make a will in favor of the son, was not prejudicial to plaintiff, since the son could recover in the suit for services only because his contention in the equity suit was decided against him. *Messier v. Messier*, 233.
3. Art. XII of Amendments to Cons. R. I., Section 1, provides that "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity."

Gen. Laws, 1909, cap. 272, § 2, provides "The supreme court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided."

Held, that the court had jurisdiction to entertain a bill of exceptions based on an alleged abuse of judicial discretion in vacating a *nil dicit* judgment in the Superior Court. *Fox v. Artesian Well Co.*, 260.

4. Under Gen. Laws, 1909, cap. 289, providing that any party aggrieved by a final decree, entered in the Superior Court in an equity cause may appeal to the Supreme Court, it is not the intent of the statute to remove the cause by appeal to that court for a re-trial, but merely for the purpose of reviewing the errors stated in the appellant's reasons of appeal.
5. In equity appeals the appellant should clearly indicate in his reasons of appeal the particular errors of the Superior Court of which he complains and which he seeks to have reviewed. These reasons should be stated separately and specifically, and should consist of a statement of the erroneous rulings, orders or decrees to which the appellant objects, and not of the reasons upon which he bases his claim of error.
6. The statement of reasons of appeal in equity causes, of exceptions in a bill of exceptions and the assignments of error in an application for a writ of error are of the same nature and subject to the same requirements.
7. The rule adopted in *Blake v. Atlantic Natl. Bank*, 33 R. I. 109, and *Dunn Mills v. Allendale Mills*, 33 R. I. 115, with regard to the form of statement of exceptions in a bill of exceptions is applicable to the form of reasons of appeal in equity causes.
8. A claim of appeal in equity alleged that the decision of the justice upon which the final decree was based was (a) erroneous and against the evidence; (b)

against the law; and that the final decree was (a) against the evidence and (b) against the law:—

Held, that the reasons of appeal set out that the determination of the court upon the facts was not warranted by the testimony and his application of equitable principles to the facts as he found them was erroneous; that the reasons were not indefinite and were sufficiently specific and to the consideration of such alleged errors appellants would be restricted.

9. *Semble*: While the statute in regard to probate appeals provides that the appellant shall be restricted to his reasons of appeal specifically stated, yet in practice due to the nature of the proceedings, the trial in the Superior Court in most cases is essentially *de novo*. When the subject matter and the appellant's relation to it permits, although the moving party in the probate court continues to be the moving party in the Superior Court, the trial in the latter court is restricted within the limits fixed by the reasons of appeal. *Vaill v. McPhail*, 361.

10. A final decree in equity is not necessarily the last order in the case.

A decree to be final must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance on appeal, the court below would have nothing to do but to execute the decree it had already rendered.

There is an exception to this rule, where to enforce it would result in possible hardship and injury, and in such cases decrees strictly interlocutory are held to possess such an element of finality as to bring them within the terms of the statute. *McAuslan v. McAuslan*, 462.

11. Besides the appeals from interlocutory decrees provided for by statute, cases may occur of decrees in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review, and must be held for this reason to have such elements of finality as to permit an immediate appeal. *McAuslan v. McAuslan*, 462.

12. Another class of decrees offers a modification of the general rule. Of this class is a decree made as to one of several defendants whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant. Such decree is final as to him, although the cause may be still pending in the court as to the rest. *McAuslan v. McAuslan*, 462.

13. Upon a bill in equity seeking the removal of a trustee and an accounting, which is sent to a master to take the account and to report upon the removal of the trustee, the decree of the Superior Court confirming the master's report is not the final decree in the cause, as more is required to give the complainant the relief desired. *McAuslan v. McAuslan*, 462.

14. A final decree in an equity cause is the decree which finally determines the rights of the parties, provides for the relief which the court finds to be necessary, and at most merely requires one or more orders or supplemental decrees for its enforcement.

An appeal from a final decree in equity brings up for review all matters contained in such decree and all previous rulings, orders or decrees made or entered in the cause previous to the entry of such decree; unless such decree or such previous rulings, orders or decrees from the circumstances or the

manner in which they have been made or entered, are not reviewable, and said decree or such previous rulings, orders or decrees are not reviewable unless it is specifically stated in the reasons of appeal that objection is made to such decree or previous rulings, orders or decrees. *McAuslan v. McAuslan*, 462.

15. A supplemental decree or order for the execution of the final decree, as above defined, is also so far a final decree as to support an appeal, but an appeal from such supplemental decree will bring up for review only such matters as are involved in the decree itself or matters arising subsequent to the entry of the final decree, but it cannot bring up any alleged error in the final decree itself or any matters arising in the cause previous to the entry of the final decree, and only the alleged errors stated in the reasons of appeal. *McAuslan v. McAuslan*, 462.
16. As under the practice in equity exceptions cannot be taken to the report of a master, where no objections were taken to such report before the master, under the statute the findings of the master became conclusive on the parties, and an appeal from the decree entered in the cause does not have the effect of opening that matter before the appellate court. *McAuslan v. McAuslan*, 462.
17. If the Superior Court should not have reversed the findings of a master in the absence of exceptions to his report, the Supreme Court, upon appeal, will not consider the propriety of his findings nor reverse nor modify them. *McAuslan v. McAuslan*, 462.

CONDUCT OF COURT: See WITNESSES, 1-2.

FOR PROBATE APPEAL: See EXECUTORS AND ADMINISTRATORS, 7-8.

See NEW TRIAL, 1-2.

ASSAULT AND BATTERY.

1. In an action of trespass for assault and battery, wherein plaintiff claimed to have been struck by a pail thrown by defendant, instruction that if defendant unintentionally and carelessly allowed it to drop and strike plaintiff he was liable, but only for compensatory damages, was erroneous and unsupported by the evidence, which on the part of the plaintiff showed a wilful and intentional act and on the part of defendant an unconscious act due to faintness.
2. An action of trespass for assault and battery is based upon wilful and intentional acts and not upon negligence, and evidence of negligence on the part of a defendant is inadmissible. Where plaintiff intends to rely upon the negligence of the defendant the form of action should be in trespass on the case. Hence, in an action of trespass for assault and battery, instruction that if defendant unintentionally and carelessly dropped the instrument by which plaintiff claimed to have been struck, he was liable, but only for compensatory damages, was erroneous. *Baran v. Silverman*, 279.

ASSUMPSIT, ACTION OF.

See DAMAGES, 2.

ATTACHMENT.

1. An estate of tenancy by the curtesy initiate is not attachable for the debts of the husband. *Carroll v. Sanford*, 337.

See GARNISHMENT, 7.

See REFORMATION, 3.

ATTORNEY AND CLIENT.

1. The retainer of an attorney in a suit brought against an administrator confers no implied authority to waive the proper prosecution of the claim according to law. *Andrews v. O'Reilly*, 256.
2. Where an attorney who had been retained to prosecute plaintiff's claim against defendant, arising out of a collision, accepted a retainer from defendant to defend actions brought against him by others, who were also injured in the same collision, and plaintiff who was ignorant of the fact of such retainer, relying largely upon the advice of his attorney, executed a release to defendant, and settled his claim, the release will not be regarded as representing the real consent of plaintiff and will be held to be invalid.
3. Where a defendant knew that an attorney was acting for the plaintiff in an action against him, and never having retained him before, immediately thereafter employed him to act in defence of other actions pending against defendant, arising out of the same accident, and shortly afterwards a release was procured from plaintiff; irrespective of the good faith of the defendant, he will not be permitted to retain the advantage of a release procured under such circumstances.
4. While the fact that the negotiations leading to the release of plaintiff's claim, were conducted on the part of defendant through the agent of an insurance company with which defendant had a contract for indemnity, bears upon the question of the good faith of the defendant and of the attorney for plaintiff, it cannot vary the rule arising from the relation of attorney and client under which plaintiff was entitled to a full disclosure of every material fact in the possession of the attorney. *Pilling v. Benson*, 519.
5. Whether or not an attorney shall be disciplined rests in the discretion of the court, upon examination of the facts connected with the special complaint against him, and such other facts as may appear during its investigation, and the court is not limited to the precise charges of the complaint, but may act upon any other information which it may properly and regularly acquire. The court is not bound in its action by any particular rule of law, nor is it essential that the basis of discipline should be acts creating civil or criminal liability, but a proper basis for action may be found in conduct evidencing an unfitness for that confidence and trust which necessarily attends the relation of attorney and client or in such lack of honesty and moral character as would render the party under examination unworthy of confidence. Aside from the conduct of an attorney in connection with professional affairs, any conduct demonstrating a moral condition inconsistent with the proper appreciation and discharge of professional duties and obligations may also form a just basis for discipline.

6. Upon a complaint against a member of the bar evidence considered and he'd to warrant disbarment. *In re Lizotte*, 543.

BAIL.

1. A justice of any district court has authority under Gen. Laws, 1909, cap. 354, §14 and 15, to permit a recognizance to be given before him to release a person committed under process from the Superior Court to answer to an indictment pending in said court, provided the recognizance conforms to the terms of the process under which he was committed, and provided the sureties are accepted by said justice after a suitable examination as to their sufficiency.

This authority is not limited by Gen. Laws, 1909, cap. 305, § 30.

2. A writ of habeas corpus ordering the keeper of the jail to produce the body of a respondent committed under process of the Superior Court to answer to an indictment pending in said court, before a justice of a district court in order that said respondent might there give recognizance, with sureties which had previously been examined and accepted by said justice, will be denied, where it appears that no proper investigation had been made either before said justice or before the Supreme Court upon petition for said writ, as to the sufficiency of such sureties. *Petition of Quigg*, 504.
3. The power of the Superior Court to require additional bail to be given is not restricted to the circumstances named in Gen. Laws, 1909, cap. 298, § 23, providing that whenever a person convicted of any crime shall file a motion for a new trial or notice of his intentions to prosecute a bill of exceptions, the Superior Court may require him to give additional bail, but the court has inherent authority to require additional bail in cases pending before it whenever in its judgment such additional bail becomes necessary to secure the presence of a respondent before it for trial or sentence, provided it be not excessive in amount.
4. Where a respondent fails to give additional bail and is committed to jail for such failure, his obligation and that of his sureties upon the original recognizance are discharged. *Petition of Mariano*, 534.

BALLOTS.

See ELECTIONS, 1-4.

BANKRUPTCY.

1. Under the provisions of the federal bankruptcy act, Section 1, subdivision 15, insolvency turns on what is a fair valuation of the property; hence in a proceeding to set aside a transfer brought by a trustee in bankruptcy, evidence offered by the bankrupt as to the value of his property "to him" was properly excluded. *Ziegler v. Thayer*, 288.
2. Fair valuation of property within the contemplation of the bankrupt act relative to insolvency of the alleged bankrupt would be the present market value, rather than the value to the bankrupt or the value of such property at a forced sale. *Ziegler v. Thayer*, 288.

3. Transfers of a bankrupt's property within the four months period, which would be voidable as a preference, cannot be rendered valid, by reason of a parol agreement for security made prior to the commencement of said period. *Ziegler v. Thayer*, 288.

4. The federal bankruptcy act, Section 67, clause "a," provides "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

Gen. Laws, 1909, cap. 258, § 10, provides that no mortgage of personal property shall be valid except as between the parties, unless possession is taken or it is recorded in accordance with the statute within five days of its date:—

Held, that as a mortgage would not have availed as against creditors unless recorded in accordance with the statute, a parol agreement to give security was without effect. *Ziegler v. Thayer*, 288.

See CONSTITUTIONAL LAW, 1-5.

CARRIERS.

PERSONAL INJURIES.

1. A declaration which alleges that a car of defendant was moving in the same direction as the wagon in which plaintiff was being carried as a passenger; that plaintiff was in the exercise of due care; that he had no control over the driver of the wagon; that without any notice or warning defendant operated its car so negligently that it struck the wagon and threw plaintiff therefrom, injuring him, shows with sufficient clearness a rear end collision brought about by the negligence of defendant without warning of approach under such circumstances as to preclude plaintiff from stating more facts regarding it, and sets forth a *prima facie* case of actionable negligence. Whether plaintiff is obliged to negative by allegation and proof the negligence of the driver of the wagon is not decided. *Galvin v. R. I. Co.*, 283.

CERTIFICATION OF QUESTION OF LAW.

1. General Laws, 1909, cap. 298, § 5, intends that only questions of law which have in fact arisen in some proceeding pending in a lower court, prior to the trial of such proceeding on its merits, shall be certified for determination. It is not enough that such question may arise later, but it must be one actually presented and one the determination of which is necessarily involved in the ruling of the court upon the particular phase of the case then before it. If it must be based upon a particular state of facts found to exist, such underlying facts must be determined by the court, and such question should not be certified except in the case where the court after careful consideration, aided by counsel, is unable to reach a satisfactory conclusion and the question still appears a doubtful one. *Tillinghast v. Johnson*, 136.

2. Where a question of law certified for determination sets out that the contents of a sealed parcel "were not exempt by law from attachment," the court must have found what such contents were, in order to have determined that fact, and where it appeared that the garnishee was ignorant as to the con-

tents the court must have determined such fact upon other evidence than the return of the garnishee, and there being no transcript of testimony the appellate court must presume that the court below was justified in its finding, from testimony given before it in some hearing to determine whether the garnishee was properly chargeable, otherwise the fact should not have been incorporated in the question. *Tillinghast v. Johnson*, 136.

CHAMPERTY AND MAINTENANCE.

1. Where an agreement is champertous, the illegality extends to all acts done in pursuance thereof.

Where an agreement is champertous, a deed between the parties in pursuance of the agreement, whereon a bill in equity to set aside a foreclosure is based, is tainted with the same illegality and affords no basis for relief.

Champerty is an offence against the law and avoids every contract into which it enters.

After a foreclosure, the mortgagor deeded his interest to complainant, under an agreement by which complainant was to bring proceedings at his expense to set aside the foreclosure sale, and if successful in this, to sell the property and divide the profits.

Held, that the agreement was champertous. *Kelley v. Blanchard*, 57.

CONFLICT OF LAWS.

See CONSTITUTIONAL LAW, 2-3; SEE WILLS, 17-18.

CONSTITUTIONAL LAW.

1. Under the provisions of Cons. U. S., Art. I, § 8, "The congress shall have power:—to establish uniform laws on the subject of bankruptcies, throughout the United States," this power when exercised and to the extent that it is exercised, is exclusive. However it is not the mere existence of this power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the states.
2. A state has authority to enact bankrupt or insolvent laws that do not conflict with Federal bankrupt laws then in force.
3. Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with the national bankrupt act of 1898, for though the bankrupt act suspends the operation of any state insolvent law where there is any conflict between the two, the state law remains in full force in so far as there is no conflict, and as the bankrupt act expressly exempts from its involuntary proceedings, wage earners and farmers, the power of the state exists over such cases.
4. Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with U. S. Cons. Art. I, § 10, and R. I. Cons. Art. I, § 12, in that it impairs the obligations of contracts or is retroactive, for as to any contract made after its passage, the act entered into such contract as part of the existing

law, and as to an ordinary open account between attorney and client for services which commenced prior to the passage of the act the obligation of the contract remains unimpaired, although its value may have been impaired by the neglect of the attorney to use due diligence in the collection of his charges.

5. Gen. Laws, 1909, cap. 339 "Of proceedings in insolvency," is not in conflict with U. S. Cons. Art. XIV of amendments, or R. I. Cons. Art. I, § 10, as depriving a person of property without jury trial and due process of law, since in a bill in equity brought by an assignee in involuntary insolvency, to recover property alleged to have been conveyed in fraud of creditors, a jury trial may be had upon issues of fact, while such a proceeding is one well recognized as appropriate for that purpose in the law of the land. *Lace v. Smith*, 1.
6. Gen. Laws, 1909, cap. 238, §§ 7 and 8 "of the Metropolitan Park Commissioners" providing for the appointment of commissioners to determine the proportion in which the cities and towns constituting the metropolitan park district, shall annually pay money into the state treasury to meet the requirements and expenses under said act as estimated by the general treasurer and commissioners, and providing that the award of the commissioners after being accepted by the superior court, shall be final and binding on all parties and that the sum so estimated shall be included in the assessment of the annual state tax against the said towns and cities, is not obnoxious to Cons. R. I. Art. I, § 2, "the burdens of the state ought to be fairly distributed among its citizens," nor to Art. I, § 15, "the right of trial by jury shall remain inviolate," nor to Art. I, § 16, "private property shall not be taken for public uses without just compensation," nor to Art. IV, § 2, as a delegation of legislative power, nor to U. S. Cons. Art. XIV of amendments, "nor shall any state deprive any person of life, liberty or property, without due process of law."
7. Cap. 238, Gen. Laws, 1909, contemplates the improvement and conservation of the public health, and was passed in exercise of the police power of the state. It is therefore entitled to a liberal construction. *In re Metropolitan Park Loan*, 191.
8. How the burdens of the State shall be fairly distributed, is a question of a purely legislative character, with which the judicial department has no concern, where the legislative discretion has been exercised honestly and in good faith and not for the purpose of personal oppression under color of law. *In re Metropolitan Park Loan*, 191.
9. There is no constitutional objection to the authorization of the legislature by the people, to provide for State bonds not to exceed \$300,000 for the acquirement and improvement of real estate for public reservations and parks in the metropolitan park district; the amount expended to be repaid to the state in accordance with the provisions of Gen. Laws, 1909, cap. 238. *In re Metropolitan Park Loan*, 191.
10. The State constitution is silent as to local government and nowhere attempts to restrain the power of the legislature over the various cities and towns. *In re Metropolitan Park Loan*, 191.

SEE EQUITY, 4; SCHOOLS AND SCHOOL DISTRICTS, 2.

CONSTRUCTION.

OF INSTRUMENT: See CONTRACTS, 4-7; DEEDS, 1-7; TAXATION, 7-8.

OF STATUTES: See CONSTITUTIONAL LAW, 7; STATUTES, 1-3.

OF WILLS: See WILLS, 1-12, 15.

See also WORDS AND PHRASES, 1.

CONTRACTS.

1. Evidence *held*, insufficient to show a contract between the parties. *Clary v. Wolf*, 263.
2. In assumpsit for work and labor in the construction of a staircase on property in possession of tenant of defendant, charge of the court, that if the jury found the work was done without request of defendant and under a mistake by plaintiff, and that defendant ordered it removed, yet if she used the staircase or permitted her tenants to do so, plaintiff could recover, constituted reversible error, since by the notice to remove the work performed without her knowledge defendant had done all she was required to do and there was no evidence of any use, by which a ratification might be shown.

Upon such facts the burden of seeing that tenants did not use a staircase which from want of proper surroundings was neither available nor led to anything which a tenant might require was not cast upon defendant and the fact that a tenant *might* have used the steps at some time would not amount to their acceptance by defendant. *Clary v. Wolf*, 263.

3. Unless a contract or option provides for acceptance in writing, an oral acceptance is sufficient or it may be proved by the acts of the parties. *Eastman v. Dunn*, 416.
4. In the construction of contracts, the intention of the parties must govern when it can be clearly inferred from the terms of the contract and can be fairly carried out consistently with the settled rules of law.

Words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation. *Newport Water Works v. Taylor*, 478.

5. A contract between a city and a water company provided that the company should furnish the city with water for its use for the public buildings and many specified purposes, including "fourteen spring drinking fountains of ordinary capacity and one constantly running fountain on Washington Square," at an agreed price, and that water in addition to what was designated should be allowed at stipulated rates, including among other purposes, "spring fountains of the kind above mentioned at \$25 a year each." Said rates were to continue until the price to be paid by the city should be equal to \$10,000 a year in all, and then the city was to pay only at said last mentioned rate, and all additional or greater use of the water should be free. "Said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said city at its pleasure."

The city council passed a resolution authorizing the erection of three fountains similar to that on Washington Square, and for several years the city paid for their use at the rate of \$100 a year each, in addition to the sum of \$10,000, and after a period of four years during which no payment was made for the fountains, upon claim made therefor by the water company appropriated the amount necessary for the payment of such claim:—

Held, that upon the terms of the contract considered with reference to the situation and circumstances of the parties at the time of its execution and in the light of the construction given to it by the conduct of the parties since it went into operation, only one constantly flowing fountain was contemplated by the contract as included under the maximum price of \$10,000.

6. In the construction of contracts, general terms are restricted and limited by particular recitals when used in connection with them.
7. Where the construction of an instrument in writing is doubtful, and the parties have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties. *Newport Water Works v. Taylor*, 478.

See CHAMPERTY AND MAINTENANCE, 1; DAMAGES, 2-3; EVIDENCE, 1-2; 14, 17-24, 26; GIFTS, 1; GUARANTY, 1-3; PARENT AND CHILD, 1-3; PRINCIPAL AND AGENT, 1.

CORPORATIONS.

1. An agreement of a board of directors of a corporation attempting to bind the corporation and stockholders as to the membership of the board of directors is *ultra vires*. *Soutter v. Seekonk Lace Co.*, 304.

See GUARANTY, 1-3.

COURTS.

1. District courts being courts of inferior jurisdiction, and existing only by statute, have only such powers as are expressly granted to them by law.
2. Writs of mesne process issued by one district court, cannot be returnable in another district, but must be sued out of the court in which the action shall have been commenced. *Hall v. Tabor*, 508.

CURTESY.

See ATTACHMENT, 1.

DAMAGES.

1. Rule, in contracts, where breach consists in preventing the performance of the contract, without the fault of the other party who is willing to perform; fully stated. *Eastman v. Dunn*, 416.
2. Where plaintiff under an agreement with defendant turned over to him an option whereby defendant received a valuable lease and in accordance with the agreement, looking to an ultimate partnership interest, devoted his

time and services at defendant's request in an endeavor to carry out the agreement, upon the repudiation of the agreement by defendant, plaintiff may recover in assumpsit both the value of the option and of his services.

In such action, where the value of the option and of the lease obtained thereunder was shown by expert testimony to have been upwards of \$23,000 at the time when it was procured, a verdict for \$18,000 will not be disturbed. *Eastman v. Dunn*, 416.

3. Charge of court that if the jury found for plaintiff he would be entitled as damages to the fair market value of a lease at the time he turned it over to the defendant, was not prejudicial, where plaintiff had accepted an option whereby he might have taken the lease in his own name and assigned it to defendant, but to avoid this circuitry permitted it to be made direct to defendant. *Eastman v. Dunn*, 416.

See ASSAULT AND BATTERY, 1-2; EVIDENCE, 8, 9, 18, 20, 21, 22, 23, 24, 26.

DEBT LIMIT.

See EVIDENCE, 12; MUNICIPAL CORPORATIONS, 4-5.

DECREES.

See APPEAL AND ERROR, 4-17.

DEEDS.

1. A grant under an ancient deed, in consideration "that the inhabitants of the town of Little Compton having opened a highway of Two Rods wide," etc.,—"unto the sd. Town the following priviledges (among others)—at Fishing place Cove—to Land Wood Lumber and any other Commodity—for exporting any Commodity from said Cove;—Also the priviledge of building wharves in said Cove—"

Held, that the privilege of building wharves was granted to the inhabitants of the town and was not restricted to the town in its corporate capacity.

2. Because of disputes as to the privileges granted under this deed, the then owner of the land entered into a rule of court, wherein the rights of the parties were submitted to referees, one of the questions submitted and the finding being as follows: "4. In what part or parts of said cove the said inhabitants have the right, if any, to build, erect, or maintain wharves?" "That a wharf or wharves may be built and maintained in any part or parts of said cove as above defined, at the pleasure of said town."

Held, that the question was a construction by the parties in interest of the terms of the deed and the finding was that such wharves might be built and maintained by the inhabitants. *Narr. Real Estate Co. v. Mackenzie*, 103.

3. Plaintiff having constructed its building so that its foundation encroached upon the land of ancestor of defendant, about two feet, with the eaves extending over a further distance of about two feet, defendant's ancestor by deed quitclaimed his interest in the land appropriated with the "privilege for the roof of said meeting house to drip on my land forever."

At this time the building had been completed.

Held, that the intent of the grant was to permit the drip from plaintiff's building as it then stood, to fall upon defendant's land.

4. The extent of the rights acquired under a grant, must depend upon the construction placed upon its terms, and in the construction of such instrument, the court will look to the circumstances attending the transaction, the situation of the parties and the state of the thing granted, to ascertain the intention of the parties, and in case of doubt, the grant must be taken most strongly against the grantor.
5. An express grant of a particular right carries with it by implication the additional right of doing whatever is reasonably necessary for the enjoyment of the right, and where one has acquired the right for his roof as it then existed to drip on the land of another, he has the right to maintain the roof from which the drip flows, and this easement is not nullified so as to permit the servient estate to remove all overhanging objects, by the fact that in an action for trespass and ejectment between the owners of the dominant and servient estates, in which the question of the easement was not raised, the title of the owner of the servient estate in the strip of land over which the roof projected, was confirmed. *First Baptist Soc. v. Wetherell*, 155.
6. In construing the description in a deed, the grant of certain privileges over a strip of land is inconsistent with the grant of a fee therein. *Dodge v. Lavin*, 409.
7. A deed executed in 1857, acknowledged the receipt of a valuable consideration paid to grantor by the "treasurer of school district No. 2 of the town of East Greenwich," and conveyed premises to "the inhabitants of district No. 2, their heirs, successors and assigns," "to be used to set a school-house upon and other convenient buildings for school purposes and for no other purpose," "to have and to hold to the inhabitants of school district No. 2, for school purposes (so long as it shall be used as such and no longer) to them, their heirs and assigns."

Under Pub. Laws, cap. 1101, passed April 17, 1903, school districts were abolished, and "all title and interest in all of the school-houses, land, furniture and other property which was vested in the several districts shall be vested in the town in which the said districts were located":—

Held, that the conveyance was to the school district as a corporation.

Held, further, that upon the abolition of the district its title became vested in the town for school purposes. *Town of East Greenwich v. Gimmons*, 526.

DEFAULT, REMOVING.

1. In the matter of motions to take off defaults, where the question whether the defendant has a defence on the merits is involved, the court will not seek to determine whether the defence claimed will prevail on a trial.

Upon a motion to remove a default, it was error for the court to pass upon the truth and sufficiency of defendant's claim, which could only properly be passed upon by a jury or by the court in case jury trial was waived. *Centreville Bank v. Inman*, 391.

DEMURRERS.

See EXCEPTIONS, BILL OF, 3.

DEPOSITIONS.

See APPEAL AND ERROR, 1.

DISBARMENT.

See ATTORNEY AND CLIENT, 5-6.

DISTRICT COURTS.

See COURTS.

DIVORCE.

1. Upon a petition for divorce, on the ground that the marriage was void, for the reason that at the time, petitioner had a husband living, who was still alive, it was error for the court to dismiss the petition on the ground that petitioner was *in pari delicto* with the respondent, since the second marriage was a nullity and the court should so declare. Under such facts the legal status of petitioner is something in which the State as well as the parties is interested. *Lynch v. Lynch*, 261.

DRIP, RIGHT OF.

See DEEDS, 3-5.

EASEMENTS.

See DEEDS, 3-5.

ELECTIONS.

1. Where in a petition in equity in the nature of *quo warranto* bringing in question the title to the offices of town council and tax assessor, it appeared that the town council did not mark as "defective" the rejected ballots, nor separate them, but placed all the ballots in a sealed package, the court cannot open the package and review the action of the town council, as the ballots cannot be identified, nor upon the allegations in the petition, assume the functions of the town council and recount the vote.
2. Upon a petition in equity in the nature of *quo warranto* bringing in question the title to the offices of town council and tax assessor, without examining the ballots, evidence of witnesses as to the "defective" ballots heard and:—
Held, that more than 16 and less than 25 ballots cast for petitioners were illegally rejected and claims of certain of petitioners to the offices sustained.
3. A ballot having one line of the (X) crossing, but not extending to the same length as the other line, producing a mark to a certain extent resembling the letter "Y," is not invalid as constituting a distinguishing mark.
4. A ballot having a so-called "hook" consisting of a slight curve at the top of one of the lines forming the (X), is not invalid as constituting a distinguishing mark. *Clarke v. Joslin*, 376.

See TAXATION, 1-6.

EQUITY.

1. Upon a bill in equity seeking the removal of a trustee and an accounting, where it was clear upon the pleadings that complainants were entitled to the account and there were no issues raised by the pleadings which required determination before a reference to a master, the court properly referred the cause to a master after bill, answer and replication filed, and the question of the removal of the trustee was involved in the question of the nature and propriety of his dealings with the trust estate and the master was properly directed to report his conclusions upon the question of removal. *McAuslan v. McAuslan*, 462.
2. Where a cause is referred to a master to state an account and to report upon the removal of a trustee, the decree of reference being entered after notice and hearing and the scope of the reference being particularly defined in the decree, there is no force in the objection that such reference preceded the framing of issues. *McAuslan v. McAuslan*, 462.
3. Where upon a bill in equity seeking the removal of trustee and an accounting the cause is referred to a master under Gen. Laws, 1909, cap. 289, § 17, to hear testimony and report it and his findings to the court, there is no delegation to the master of the court's power of decision in the cause. *McAuslan v. McAuslan*, 462.
4. Upon a bill in equity seeking the removal of a trustee and an accounting, the reference of the cause to a master under Gen. Laws, 1909, cap. 289, § 17, to hear testimony and report it and his findings to the court, is not obnoxious to the fourteenth amendment to Cons. U. S., as not having been in accordance with "due process of law." *McAuslan v. McAuslan*, 462.

APPEALS IN; See APPEAL AND ERROR, 4-17.

EVIDENCE.

1. In an action to recover for board of defendant's intestate, defendant offered evidence as to money received by plaintiff from intestate. This was not offered to show payments on account but to show the relationship of the parties and the matter was also the subject of another suit between the parties to recover the money.
Held, properly excluded.
2. In an action between members of a family to recover for board, request to charge that the contract to pay board, not to be enforced until after death, when claimed to have been made by an aged and infirm person must be established by the strongest evidence, was properly refused, and charge that it might be established by a preponderance of the evidence was applicable to the case. *White v. Almy*, 29.
3. In an action on book account, the bookkeeper of plaintiff was properly permitted to testify from a book as to the alleged account, where it appeared that the original slips had been accidentally destroyed by fire, and that the book contained correct copies thereof, made by her, for irrespective of the validity of the book as one of original entry, it was competent secondary evidence of the contents of the slips.

Q. "How much do you consider is your loss in being deprived of the use of your automobile?"

Held, properly excluded as calling for an opinion and not for facts. *Flint Motor Co. v. Everson*, 65.

4. A party may not be interrogated as to his reason for bringing a certain action, since the motives of the parties are presumed to be proper.
5. In an action for money loaned, evidence as to a conversation with the deceased wife of plaintiff in the absence of the plaintiff was properly excluded, where the wife was never a party to the suit.
6. In an action for money loaned, evidence as to the conduct of plaintiff, while living in defendant's household, was properly excluded.
7. In an action for money loaned which defendants claimed was a gift, witness for defendant testified that he had sold some land to plaintiff which latter deeded to one of defendants, and that at the time, plaintiff said he was buying the land for defendant and witness remarked that it would be a great present for her. He was then asked, "What was the reason you said it?"

Held, that while the language, silence and general behavior of the plaintiff on that occasion were relevant, evidence as to witness's reason for making the remark was properly excluded. *Musk v. Hall*, 126.

8. In an action for negligence, causing personal injury, testimony of plaintiff that he bought wood, which he could have sold at a profit, but on account of the injury, sold it at a loss, is not open to the objection that it is in proof of a lost contract, not alleged in the declaration, and is admissible.
9. In an action for negligence, causing personal injury, plaintiff was properly permitted to testify that he was deprived of the opportunity in his occupation as a teamster, of carrying between two towns merchandise for which there was a market in each town, such testimony not being open to the objection that it was speculative.

10. Rule 19 of rules of practice of the superior court provides that no paper which is not set forth or substantially stated in the pleadings, shall be used as evidence unless notice shall be given the opposite party at least 3 days before the trial.

Held, that, where a declaration in a personal injury case averred that plaintiff within 60 days after the accident presented to the town council a particular account in writing of his claim and how and when and where the same was incurred and that satisfaction had not been made within 40 days after the presentation of said claim, the record of the town council relative to such claim, was that of a paper substantially stated in the pleadings and was properly admitted when testified to by the town clerk. *Beebe v. Greene*, 171.

11. In assumpsit to recover for work and labor the admission of question to defendant "you intended to have these steps fixed, at all events?" while immaterial was not prejudicial error. *Clary v. Wolf*, 263.
12. In an action brought by plaintiff for services rendered by him as chief of police, town sergeant and dog officer, evidence offered to show that the debt limit of the town had been exceeded was immaterial, in the absence of proof

showing that the town had not the means in its treasury to pay the claims or that it would not have the means from its current revenues.

13. In an action to recover for the services of a municipal officer oral evidence offered by defendant's counsel in person, that there was no appropriation made by any proper authority from which payment of plaintiff's claim could be made, was properly excluded, where the record evidence was neither produced nor the lack of such evidence accounted for. *Trainor v. Lee*, 345.
 14. In an action for breach of contract, between plaintiff and defendants, where defendants were joint lessees of certain property and had joint interests analogous to that of partners, plaintiff was properly permitted to introduce evidence for what it was worth, of things done by him at request of one defendant at a time when latter had told plaintiff that he and the other defendant were having nothing to do with each other, as plaintiff did not know the breach was irreconcilable and the evidence tended to show the relations of the parties and that plaintiff was acting in good faith in an endeavor to carry out the agreement, since each defendant was the agent of the other in matters of their common interest. *Eastman v. Dunn*, 416.
 15. A duplicate carbon copy of a letter sent by plaintiff to defendant by registered mail, which was a mere notice intended to ascertain whether defendant would carry out his agreement with plaintiff without stating what such agreement was, is not open to the objection of being manufactured evidence, and also comes under the exception to the rule regarding secondary evidence, that a notice of claim may be proved by parol or by duplicate and the original need not be required.
- It was also admissible in connection with admissions of and conversations with defendant, to connect and explain them and show that the action was not prematurely brought. *Eastman v. Dunn*, 416.
16. Evidence tending to prove that defendant had made statements that he had rehearsed his story with others and would swear the court house out if necessary, was properly admitted as affecting his veracity, as well as on the ground of public policy. *Eastman v. Dunn*, 416.
 17. In an action for breach of contract where plaintiff had permitted defendants to obtain a lease under an option held by plaintiff, the motive which influenced plaintiff to delay before accepting the option, within the time provided for such acceptance, is immaterial. *Eastman v. Dunn*, 416.
 18. Upon the question of the value of an option, testimony of a real estate broker, as to its value and also as to the value of the property at certain dates and the rate of increase in value of the property during a certain period and the reasons therefor, was admissible both as showing his familiarity with the property and other surrounding property, as a part of his qualification as an expert, and as showing the value of the option. *Eastman v. Dunn*, 416.
 19. The competency of persons offered as experts is generally a question for the trial court, and unless its ruling is palpably and grossly wrong, it will not be reversed. *Eastman v. Dunn*, 416.
 20. In an action for breach of contract upon the question of the value of an option where it appeared that plaintiff had accepted the option and made

use of it as a basis of an agreement with defendant, whether he could have exercised it himself without aid from others or could have gotten anything for it from other parties, is immaterial. *Eastman v. Dunn*, 416.

21. Upon the question of the value of an option, turned over to defendant whereby he acquired a lease, evidence as to a statement made by defendant of his price for the lease, as well as a paper containing figures given by defendant to a real estate agent to be used in interesting a prospective purchaser of the leasehold interest shortly before the trial, are admissible as admissions against interest as well as to explain in connection with other evidence the treatment of plaintiff by defendant, after he had acquired plaintiff's rights. *Eastman v. Dunn*, 416.
22. In an action for breach of contract upon the question of the value of an option where it appeared that plaintiff had accepted the option and made use of it as a basis of an agreement with defendant, whether he paid anything for the option is immaterial. *Eastman v. Dunn*, 416.
23. In an action against defendant for breach of contract, upon the question of the value of an option acquired by defendant from plaintiff, evidence offered by defendant tending to prove that the owner of the property had been trying to sell it at a lower figure and had given a previous option at a lower figure, was properly excluded. *Eastman v. Dunn*, 416.
24. In an action against defendant for breach of an agreement, upon the question of the value of an option acquired by defendant as a result of such agreement from plaintiff, evidence as to whether the owner of the property would have allowed plaintiff to accept the option if he had not had a satisfactory financial backer, was immaterial and properly excluded, where it was provided in the option that plaintiff should give bond with sureties satisfactory to the owner, which contemplated such a financial backer and plaintiff testified that he had one before he met defendant. *Eastman v. Dunn*, 416.
25. Evidence calling for opinions from witnesses as to the value of the testimony of other experts is properly excluded. *Eastman v. Dunn*, 416.
26. In an action against defendant for breach of an agreement upon the question of the value of an option, evidence of an expert as to whether in his experience he had ever known an option on real estate to be sold for any considerable sum was properly excluded. *Eastman v. Dunn*, 416.

FOR EVIDENCE IN SUIT ON FIRE INSURANCE POLICY, See INSURANCE, FIRE, 3-5.

See PARENT AND CHILD, 4-6; WITNESSES, 1-2.

EXCEPTIONS, BILL OF.

1. Under Gen. Laws, 1909, cap. 298, bills of exceptions are not in order for filing in the superior court and for certification to the supreme court until after all matters arising in the cause in the superior court have been determined, and in case a motion for new trial is made by *either* party, not until after decision upon that motion.

The practice provided by statute is that all exceptions, taken by both parties, up to the end of the period within which exception may be taken to the final

decision in the superior court shall be before the court for determination at one time.

2. General Laws, 1909, cap. 298, § 17, provides that a party desiring to prosecute a bill of exceptions shall "within seven days after verdict or notice of decision, but if a motion for a new trial has been made, then within seven days after notice of decision thereon file notice of his intention to prosecute a bill of exceptions."

Within seven days after a verdict for plaintiff, defendant gave notice of intention to prosecute a bill of exceptions. Also within seven days plaintiff filed motion for new trial on the ground of inadequacy of damages.

Held, that defendant's notice was prematurely filed and should be refiled after decision of the court upon plaintiff's motion for new trial. *Sullivan v. White*, 61.

3. Where on a declaration containing several counts, a demurrer is sustained to one count and overruled as to the others, the decision of the Superior Court sustaining the demurrer being a "decision prior to trial," cannot under Gen. Laws, 1909, cap. 298, § 24, be brought up on exception until "after verdict or final decision on the merits." *Sanitary Oyster Co. v. Merwin Co.*, 381.

See APPEAL AND ERROR, 3; NEW TRIAL, 1-2.

EXCEPTIONS TO REPORT OF MASTER.

See APPEAL AND ERROR, 16-17.

EXECUTIONS.

1. Where at a sale under execution of personal property, subject to mortgage, the mortgagee bid in the right title and interest of the owner, but refused to pay the amount of the bid in cash, claiming that she was entitled to have the same credited upon the mortgage, the officer properly put up the property again and sold it upon the bid of another party. *Gautieri v. Cianciarulo*, 512.

EXECUTORS AND ADMINISTRATORS.

1. Gen. Laws, 1909, cap. 314, § 3, providing for the filing of claims against decedents in the probate court, does not require the setting forth of the evidence to support the claim, but it is sufficient to state such sum as claimant expects to recover.

The fact that a claim filed in a probate court against the estate of a decedent, states a definite sum as due, does not prevent recovery upon a quantum meruit. *White v. Almy*, 29.

2. Appellee, who had a continuous running account for services rendered by him as a physician to his sister, within the period of six months from the first publication of the notice of the appointment of her administrator, filed a claim against her estate, which was disallowed and suit was brought thereon and subsequently settled. Within the period of one year from said notice, appellee filed a second claim covering items for services, which he alleged he forgot to include in the first claim, but recalling the omitted

items and being advised that the claim was valid, he filed it at that time. It was not disallowed.

Held, that it was not a case of one who through accident or mistake, having severed his claim was attempting to reunite it, but of one, who, having discovered the mistake, ratified the severance by filing a separate claim, and insisted upon the validity of both claims.

Held, further, that while the statute C. P. A., § 883 (now Gen. Laws, 1909, cap. 314, § 3), gives a preference to claims filed within six months over those subsequently filed, no claimant has the right to sever claims otherwise indivisible for the purpose of making a part preferred over the other.

Held, further, that as claimant did not have two accounts against the estate he was not entitled to file two claims and there was no necessity for the disallowance of the second claim, and the administrator was not guilty of unfaithful administration for not paying the same. *Potter v. Harvey*, 71.

3. Where a husband has given bond as administrator of his deceased wife, to pay the just debts of the deceased, the personal property of the wife becomes his, and in an action to recover for money so derived and loaned to defendants he properly sues individually and not in his representative capacity. *Musk v. Hall*, 126.
4. Plaintiff summoned in an administrator to defend a pending suit, but never filed such suit as a claim in the Probate Court as required by Gen. Laws, 1909, cap. 314, § 3, and did not amend the declaration or in any way put anything upon the records to indicate that he had a right to prosecute same against the administrator. Defendant administrator moved to dismiss for lack of jurisdiction, on the ground that the claim had never been filed and there was nothing on which plaintiff could maintain the action as against her.

Held, that the motion was properly granted. *Andrews v. O'Reilly*, 256.

5. In a case against an administrator, it is essential to allege and prove that the claim was filed in the Probate Court and disallowed. *Andrews v. O'Reilly*, 256.
6. There is no statutory provision which authorizes the administrator to waive the filing of a claim, on which suit has been brought, as provided by statute Gen. Laws, cap. 314, § 3. *Andrews v. O'Reilly*, 256.
7. On a probate appeal from the allowance of an account of an executor, the only evidence submitted was offered by the appellants and only as to certain of the items objected to. While the account of the executor sworn to was submitted it did not appear that the account was submitted by or sworn to by him in court, or that the executor was present so that he could be cross-examined, nor that the appellants consented to the admission of the account as *prima facie* evidence, and waived proof of the items of the account:—

Held, that the procedure was irregular, since the mere presentation of the account from the Probate Court was not evidence of the correctness or propriety of the items, and should not have been accepted by the court except by stipulation of the parties, and in allowing the items the court acted without evidence and so without authority. *Carney v. Hawkins*, 297.

8. Under rule 14 (law rules) of the Superior Court, on appeal from an account of an executor or administrator, the administrator or executor who presented the account in the Probate Court is "the party holding the affirmative" and should proceed to present the account and vouchers or other evidence in support of the items as to which appeal is claimed, at the outset, otherwise there is no evidence as to which appellants are required to offer any testimony. *Carney v. Hawkins*, 297.
9. Where it appears that an execution settled by an executor was on a personal judgment against himself and not against the estate, the item is properly disallowed. *Carney v. Hawkins*, 297.
10. After disallowance of a claim filed in a Probate Court, claimant brought suit against the executor personally, and more than a year after notice of such disallowance, by agreement of parties the writ and declaration were amended so as to make it a suit against the estate:—
Held, that the attempted amendment of the suit was in legal effect the institution of a new suit against the executor after the statutory period of limitations of six months, under C. P. A., § 891, had taken effect, and the payment of a judgment on such action by the executor should be disallowed. *Carney v. Hawkins*, 297.
11. A claim against an estate of a decedent is absolutely extinguished by the special statute of limitations if not sued within six months after notice of disallowance; this cannot be waived by the executor, and if he attempts to do so the court will, on its own motion, apply the rule of the statute. *Carney v. Hawkins*, 297.

See ATTORNEY AND CLIENT, 1.

EXEMPTION FROM TAXATION.

See TAXATION, 7-8.

EXPERT EVIDENCE.

See EVIDENCE, 19, 25, 26.

FEES, STATUTORY.

See MUNICIPAL CORPORATIONS, 1-6.

FINAL DECISION.

See EXCEPTIONS, BILL OF, 1.

FINAL DECREES IN EQUITY.

See APPEAL AND ERROR, 10-17.

FIRE INSURANCE.

See INSURANCE.

GARNISHMENT.

1. A safe deposit company which has received for storage articles in a sealed parcel owned by the defendant in an action in assumpsit, and has such parcel

in its possession at the time of the service upon it of a writ of garnishment, the contents not being of a nature exempt from attachment, is chargeable as garnishee whether or not any of its officers or employees were informed as to the contents of said package.

- If under such circumstances the garnishee has refused or neglected to render the account required by Gen. Laws, 1909, cap. 301, § 10, it should be charged under cap. 301, § 20, because of such refusal or neglect. *Tillinghast v. Johnson*, 136.
2. The trial court, under present statutory provisions has as ample jurisdiction in an examination as to the liability of a garnishee, as in most other matters presented for its determination, and the construction of the provisions, now constituting Gen. Laws, 1909, cap. 301, § 18, given in *Raymond v. Narragansett Tinware Co.* 14 R. I. 310, has now no application.
 3. Where a garnishee appears and answers, disclosing that he has in his possession a sealed parcel or a locked safety deposit box belonging to defendant, the contents of which are unknown to him, the person signing the garnishee's affidavit may be summoned by either party and examined and cross examined with reference to his answer and his testimony may be contradicted. Also, under cap. 301, § 18, the court may take such action as will enable it to determine the liability of the garnishee, and this would warrant it in directing the garnishee to break the seal of the parcel or open the deposit box and inspect the contents, that he may disclose the same to the court, and enable it to determine as to whether he is chargeable and to what extent. The garnishee may be reimbursed for his expenses under cap. 301, § 27.
 4. Where the jurisdiction of the court does not depend upon whether or not there is property of the defendant in the hands of the garnishee, the order upon the garnishee to open a sealed parcel or a deposit box may be delayed until after verdict or decision against defendant, the only requirement being that it shall be before or at the time of the entry of final judgment in the case, and the court may continue the case after verdict or decision and suspend the entry of final judgment that it may have sufficient time to determine such liability.
 5. Where the jurisdiction of the court does depend upon the attachment of property of defendant in the hands of a garnishee the court will continue the case under Gen. Laws, 1909, cap. 288, § 1, and if at the expiration of such continuance, the defendant has not answered, and the affidavit of the garnishee discloses no property except such as may be in a sealed or locked receptacle of defendant, the contents of which are unknown to him, the court upon motion of plaintiff or garnishee may for the double purpose of determining its own jurisdiction and the chargeability of garnishee inquire into the contents, and if necessary order garnishee to open the receptacle.
 6. Where a defendant in an action of assumpsit, by contract with a safe deposit company, has the right to the exclusive use of a safe deposit box, owned by said company, and in the vault of said company, subject to the general control of the company, and the box except by force, can be opened only by the joint use of a master key retained by the company and of a key in possession of defendant and said box contains at time of garnishment property not

exempt from attachment, the company is chargeable as garnishee, whether or not the employees of said company are informed as to the contents of said box, for the boxes are in possession of the garnishee in the sense that the words are used in the statute, and this being so, then the contents, though the owner has attempted to bar access to them are in the garnishee's possession also and subject to garnishment. *Tillinghast v. Johnson*, 136.

7. Attachment by trustee process, being a statutory right, the provisions defining the procedure thereunder, must be strictly construed. *Hall v. Tabor*, 508.

See CERTIFICATION OF QUESTION OF LAW, 2.

GIFTS.

1. Charge of court that if plaintiff had an accepted option that was of value, as defendant claimed it was a gift to him, the burden was upon defendant, to establish that position and to satisfy the jury by a fair preponderance of the evidence that it was a gift, was proper. *Eastman v. Dunn*, 416.

See EVIDENCE, 7.

GUARANTY.

1. While a corporation is not ordinarily bound by a contract of guaranty, for the benefit of third parties, such guaranty may be given in the accomplishment of any object for which the corporation was created or when the particular transaction is reasonably necessary or proper in the conduct of its business, and whenever an act may under any circumstances be reasonably necessary, a party dealing with the corporation has the right to assume, without notice to the contrary, that the act is binding upon it.
2. Defendant corporation operating a drug store, by its treasurer signed a written guaranty of a letter of credit issued by plaintiffs to X. There was no evidence to show whether X. was in any way connected with defendant.
3. Plaintiff undertook to furnish to X. a letter of credit for a certain sum to be drawn by her at such times and in such amounts as she might determine and defendant guaranteed to pay such amounts to plaintiff as might be drawn upon such letter.

Held, that there was nothing in the transaction to excite suspicion that the matter was one of accommodation and the fact that the letter of credit was in the name of a woman was not sufficient to put plaintiffs upon inquiry, and plaintiffs were entitled to the presumption that the treasurer was acting within his authority. *Morgan & Co. v. Hall & Lyon Co.*, 273.

Held, that X. having received the amount of the letter of credit the conclusion was inevitable that she received the money by virtue of some arrangement between plaintiff and his correspondents, and there being no failure of consideration defendant was liable under the terms of such guaranty. *Morgan & Co. v. Hall & Lyon Co.*, 273.

HABEAS CORPUS.

See BAIL, 1-2.

HIGHWAYS.

1. In an action of trespass q. c. against a town in taking land for highway purposes, the evidence showed an understanding with plaintiff that the town was to reset the walls, and that the town used about one-third of the stones from the walls in a stone crusher and that material to build a good wall was not to be found in that locality.

Held, that under such facts, request to charge that if plaintiff was present and knew of the taking down of the walls and the construction of the road by the town and made no objection, the town had the right to believe that he was consenting thereto and he could not recover therefor in an action of trespass, was inappropriate, since there was no evidence that plaintiff acquiesced in the use of his walls in that manner. *Chapman v. Pendleton*, 160.

2. In an action of trespass arising out of the taking of land for highway purposes, request to charge that if plaintiff permitted the work to proceed under a promise that the town would make him whole for it, he could not recover in an action of trespass, but was confined to an action on the promise, was properly refused, since one dealing with a town or its agents is presumed to know the law relative to the scope of such agency and the powers of the town with reference to the marking out of highways, which are strictly defined by Gen. Laws, 1896, cap. 71, and nowhere include the power to enter into such an agreement. *Chapman v. Pendleton*, 160.

3. Where proceedings under which a highway was attempted to be laid out, have been quashed for irregularities, no authority can be claimed thereunder. *Chapman v. Pendleton*, 160.

4. Gen. Laws, cap. 46, § 16, provides that a person injured shall within 60 days give to the town notice of the time, place and cause of such injury, and if the town shall not make just satisfaction therefor, within the time prescribed, he shall commence his action within one year after the date of such injury.

Held, that a paper wherein plaintiff presented his "claim" against the town, for injuries alleged to have been received on a highway, through a defect therein, which set out facts as to the time, place and cause of such injury, was a sufficient compliance with the provisions of the statute requiring "notice."

5. Where an accident on a highway occurred January 13th, notice served on the town council March 14th was served within 60 days after the accident, within the provisions of Gen. Laws, 1909, cap. 32, § 12, providing that whenever time is to be reckoned from any day, such day shall not be included in such computation. *Beebe v. Greene*, 171.

6. In a personal injury case, the notice and declaration placed the defect at about 60 feet east of a gateway leading into a cemetery. Plaintiff testified that it was twenty paces "from the east gate post leading into the cemetery to the bar way down hill to the left." A witness for defendant testified that the distance was 62 feet; another witness for defendant stated 67.10 feet; other witnesses for plaintiff about 60 feet.

Held, no variance, the notice giving the information with substantial certainty. *Beebe v. Greene*, 171.

7. Within the period limited by statute, plaintiff gave two notices to a town of a claim for damages, arising out of an accident upon a highway, the first being defective. In his declaration he set up the second notice without referring to the first.

Held, that the intention to abandon the first notice was sufficiently evidenced by the fact that he declared only upon the other.

Held, further, that while it might not have been necessary to set up the notice in the declaration, having set up the second notice, evidence offered relating to the first notice was irrelevant.

8. In order to invalidate the statutory notice given a town of a claim for damages arising out of an injury upon a highway, the error must amount to a substantial defect, through which the notice fails to convey to the town the information required by statute, with reasonable certainty. If the notice is sufficient, notwithstanding the defect to apprise the officers of the town with reasonable certainty as to the time, place, etc., of the accident, it is valid.

9. Where a notice first described the place of the accident with accuracy, but continued with an erroneous description of intersecting streets, owing to the confusion of Elm street with Eli street, and it appeared that the facts set out in the notice could not apply to Elm street, but with the other description contained in such notice did apply to Eli street, the notice was sufficient to advise the town with reasonable certainty of the necessary facts. *Foxwell v. Sullivan*, 538.

See TRESPASS, 1-2.

HUSBAND AND WIFE.

See EXECUTORS AND ADMINISTRATORS, 3.

INCOME.

See WILLS, 6-8.

INDICTMENTS.

1. An indictment charging defendant with manslaughter because of his unlawful sale of an intoxicating liquor, in which poison had been mixed, is insufficient without an allegation that defendant knew such intoxicating liquor was poisoned, or the allegation of facts from which such knowledge could be inferred, although his sale of the liquor was contrary to law.
2. An indictment charging defendant with manslaughter, because of his alleged negligence in selling and delivering poison mixed with liquor, to be drunk by deceased, instead of whiskey which deceased requested, is sufficient without setting out the facts constituting the alleged negligence, or facts from which it could be inferred that defendant knew or should have known that the liquor contained the poison. *State v. De Fonti*, 51.

INSOLVENCY.

See BANKRUPTCY, 1-4; CONSTITUTIONAL LAW, 1-5.

INSURANCE (FIRE).

1. Under the provisions of an insurance policy, "1. The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value—said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers—it shall be optional with this company to take all or any part of the articles at such ascertained or appraised value—.
- "2. If fire occur the insured—shall make a complete inventory, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire—shall render a statement to this company stating the cash value of each item thereof and the amount of loss thereon" the report of appraisers fixed the sound value of the damaged property and the loss thereon in the aggregate and did not show the sound value of and loss upon each particular article.

Held, that an itemized appraisal was necessary to the exercise of certain rights expressly given the defendant, and therefore the report of the appraisers as rendered was not a sufficient compliance with the statute and was void. *Sauthof v. American Insurance Co.*, 324.

3. Plaintiff alleged that a policy of insurance which was issued in his individual name, was in fact procured for the benefit of himself as administrator and of another person who was heir-at-law of the deceased and that the agent of the defendant who wrote the policy agreed that it should cover such interests. On demurrer:—

Held, that to permit the introduction of parol evidence to show such an agreement, would be founding a right of action on a parol variation of a written contract, and would be an attempt to reform a written contract in an action at law.

4. A policy made in the name of one person cannot protect the interest of another, unless it contains words indicating that it is the intention that the interest of the other person be covered.
5. One who is not named in a policy, and whose existence is not even suggested therein cannot by parol evidence make himself a party to the contract. *Stanley v. Ins. Co.*, 491.

(INDEMNITY.)

1. Plaintiff was insured in defendant liability company, the policy being one of indemnity containing the following provision: "No action shall lie against the company, as respects any loss or expense under this policy unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after the trial of the issue." After judgment had been recovered against plaintiff in a cause of action covered by the policy, the following steps were taken. Plaintiff gave to the X Bank its note for the amount of the judgment debt, and received a cashier's check for the same amount, payable to it. It then endorsed the check in blank and delivered it to the attorney for the plaintiff in the execution, who received it in satisfaction of the execution.

The attorney thereupon, with the consent of his client, deposited the check in the X Bank, and received a certificate of deposit for the same sum, which certificate was then pledged as collateral security for the payment of the note in accordance with an agreement previously made with the bank by said attorney to furnish security for the payment of the note. This note was renewed at its maturity by a similar note. Plaintiff paid the interest in advance on both notes, as well as the witness fees in cash, in the original action, and also gave its note for \$300 to its president, who discounted it at a bank and paid the face of the note to plaintiff's attorney in settlement of his bill for services. Payment of the note was guaranteed the bank by said attorney. No agreement existed between any of the parties to these transactions, whereby the payment of the notes should be contingent upon any happening whatever or whereby in any contingency the plaintiff should receive any rebate or credit.

Held, that a payment by note instead of cash, if made in good faith, was sufficient, and amounted to a loss to the insured.

Held, further, that the notes constituted valid claims against the plaintiff, the agreed facts not disclosing any collusive features which could effect any modification of the liability of the indemnity company. *Herbo Phosa Co. v. Phil. Casualty Co.* 567.

ISSUES.

See VERDICTS, 3.

ISSUES, FRAMING OF.

See EQUITY, 2.

JOINDER OF COUNTS.

See PLEADING, 1-7.

JUDGMENTS.

Cause of Action Concluded.

See PARENT AND CHILD, 5.

Vacating Nil Dicit.

See APPEAL AND ERROR, 3.

JURISDICTION.

See COURTS.

LACHES.

See REFORMATION, 3.

LAPSED LEGACIES.

See WILLS, 13-16.

LIBEL AND SLANDER.

1. A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains crimimatory matter, which, without this privilege would be slanderous and actionable, and this is not confined to legal duties which may be enforced, but includes moral and social duties of imperfect obligation.
2. The defendant was the president of a central organization of women's clubs, and a member of the board of directors of one of the affiliated clubs, of which club the plaintiff was president. The defendant, owing to her position, had been requested to take action in an endeavor to stop the repetition of certain larcenies which had occurred at meetings of the organizations and had commenced an investigation into the facts. The chairman of one of the committees, with the secretary of the club, requested an interview with the defendant for the purpose of discussing the plaintiff's connection with the larcenies. At this meeting it was charged that the alleged slanderous words were spoken concerning the plaintiff:—

Held, that the meeting was upon a matter as to which they all had duties, and the circumstances made it an occasion of qualified or conditional privilege.

3. *Held*, further, that none of the statements were volunteered by defendant, but were in reply to questions asked by those who had an interest in the matter which circumstance alone would render the occasion a privileged one.

Held, further, that the interview being a privileged one, defendant could not be held liable for the words spoken, although the same were untrue, and in ordinary circumstances would be actionable unless in uttering them she was moved by malice toward the plaintiff, not malice in law or the absence of legal excuse, but the motive of personal spite or ill will, sometimes called express or actual malice.

4. Unauthorized communications which are actionable carry with them the inference of malice and a plaintiff without proof can rely upon the presumption of malice which arises from the slanderous nature of the words. But in a privileged communication, the occasion repels the inference of malice, and there arises a presumption of good faith which the plaintiff must satisfactorily rebut. The burden of proving express malice is thrown upon the plaintiff by reason of the privilege in the defendant.

5. At an interview which was otherwise privileged, plaintiff claimed that certain statements of defendant were sufficient to support a finding of malicious motive. Defendant, speaking of the rumors affecting plaintiff, said that she had "no positive proof," and that "as far as I am concerned, I am convinced":—

Held, that such statements were pertinent to the matter, contained no intrinsic evidence of malice and were within the privilege of the occasion.

6. At such interview, in reply to the statement, "What a terrible thing for Mr. X.," defendant replied, "It is no surprise to him, he has paid her off before":—

Held, that the previous conduct of plaintiff in this regard, having a material bearing upon the weight to be given the rumors then under consideration, was fairly related to the subject of the interview, and there being no evidence it was not honestly made, furnished no evidence of malice in view of the testimony.

7. At an interview, which was otherwise privileged, in reply to a statement showing lack of motive for the alleged acts on the part of plaintiff, defendant replied, "why, they are as poor as Job's turkey." Plaintiff claimed this was an irrelevant reflection upon her, showing malice:—

Held, that parties in such a situation are not bound to absolutely legal relevancy, and the financial condition of plaintiff being regarded by the party making the statement as material to the discussion, the reply of defendant could not be regarded as entirely immaterial, and not being itself slanderous in the circumstances of the case, was insufficient to show malice.

8. The language of privileged communications is not to be subjected to too strict a scrutiny, and merely by the use of adjectives or similes, a communication otherwise privileged is not rendered malicious.
9. Privileged communications which cannot themselves form the basis for an action of slander are not admissible for the purpose of showing malice in other communications. *Hayden v. Hasbrouck*, 556.

LICENSE.

As a Defence to Action of Trespass.

See TRESPASS 1-2.

LIFE ESTATE.

See WILLS, 2-4.

LIMITATION OF ACTIONS.

1. Where a son expected to receive compensation for his services by will, and his mother expected to pay him by will and allowed him to think he would be so paid, the statute of limitations did not commence to run until in some way the mother gave him notice that he would not be so paid. *Messier v. Messier*, 233.
2. In mutual accounts and dealings an obligation arises not from each item, but from and for the balance only. Hence the statute of limitations begins to run only from the date of the last item. *Messier v. Messier*, 233.
3. Upon a running account between a son and his mother, based on services rendered the mother, on a promise to pay the son by will, he would have no right of action in the absence of a repudiation of the agreement, until it had been fully performed, but where it has been repudiated, by act of the mother in the conveyance of her property, the right of action upon the balance representing the debt between them, thereupon accrued and the statute of limitations began to run upon that date. *Messier v. Messier*, 233.

See EXECUTORS AND ADMINISTRATORS, 10-11.

MANDAMUS.

See TAXATION, 4.

MASTER AND SERVANT.

1. A declaration alleging that a master failed to keep in repair, certain appliances furnished the servant, in that a stool used by the servant to step upon, toppled over, caused by the insecure fastening of the stool to its legs, which connections were concealed from view, and not obvious to the plaintiff without a special inspection, states a cause of action, since the stool, as described in the declaration, cannot be said to be an appliance so simple, that the master was under no duty to inspect or to keep the same in safe condition for use.

Upon the facts as alleged, the case is not one where it appears upon the declaration that plaintiff could not have been in the exercise of due care, or that if she had used her senses, she must have known of the danger complained of.

2. A servant assumes the risk of injury from dangers and defects which are so patent and obvious, that he either knows or in the exercise of ordinary care, should know of their existence, but he is under no primary obligation to investigate for latent defects, and test the fitness and safety of the place, fixtures and appliances provided by the master, but he may rely upon the obligation resting on the master to exercise reasonable care to see that they are fit and safe.
3. It does not follow that because an appliance is a simple one, the master is therefore relieved of all obligation as to care for its safety for use by his employes, or that the risk must be presumed to have been assumed by the servant. In any case the relative simplicity of the appliance, and all the circumstances of the case must be taken into consideration. The case may be so plain that but one conclusion can properly be drawn, or it may be such as under the facts disclosed to require its submission to a jury.—*Stimson v. Whitmore*, 581.

MASTERS IN CHANCERY.

See APPEAL AND ERROR, 16-17; See EQUITY, 1, 2, 3, 4.

MECHANICS' LIEN.

1. A sub-contractor entered by parol into an entire contract with the general contractor. The work and delivery of materials was done within nine or ten days after July 25, and no further work was done until October. March 8, legal proceedings were commenced to enforce the lien.

Held, that this was not a compliance with Gen. Laws, 1909, cap. 257, § 5, and petition would be dismissed. *Heck v. Casey*, 389.

MESNE PROCESS.

See COURTS, 2.

METROPOLITAN PARK COMMISSION.

1. The obligation of repayment of amounts expended under Gen. Laws, 1909, cap. 238, and under the resolution referred to in a request for an opinion of the court, falls only upon the cities and towns within the metropolitan park district. *In re Metropolitan Park Loan*, 191.

See CONSTITUTIONAL LAW, 6-9.

MORTGAGES.

See BANKRUPTCY, 4; EXECUTIONS, 1.

MUNICIPAL CORPORATIONS.

1. A town council has discretion to direct the town solicitor to defend a police officer of the town, in a suit for damages growing out of his acts as such officer, where they believe he was acting in good faith in the performance of his duty in the matter, and the attorney may recover against the town the reasonable value of his services. *Grim v. Lee*, 333.
2. Services of a chief of police and town sergeant are within that class incidental to the ordinary daily affairs of a municipal corporation, and the compensation therefor falls within the current expenses of such corporation.
3. The services of a dog officer, under the statutes, are incidental to the management of the affairs of a town as a proper police regulation and the compensation therefor fixed by law is to be deemed one of the current expenses of the town.
4. Whether or not a town has exceeded its debt limit has no application as to fees fixed by statute as compensation for a duty imposed by law. *Trainor v. Lee*, 345.
5. Opinion in *Trainor v. Lee*, 34 R. I., 345, that as to fees fixed by statute, as compensation for a duty imposed by law, the question of whether or not a town has exceeded its debt limit has no application, approved and followed.
6. A claim for repairing bicycles of and used by police officers in the performance of duty was approved and ordered paid by a town council. Such repairs had been customary and had been frequently made by plaintiff and paid for by the town. Defendant offered no evidence in dispute of the claim:—*Held*, that a motion for new trial after verdict for plaintiff, was properly denied. *Bagley v. Lee*, 358.

MUTUAL ACCOUNTS.

See LIMITATION OF ACTIONS, 2-3.

MUTUAL MISTAKE.

See REFORMATION, 1.

NEGLIGENCE, EVIDENCE IN.

See EVIDENCE, 8-9.

NEW TRIAL.

1. That the decision of the trial court in granting a non-suit, was against the evidence; against the law and against the law and the evidence, does not constitute valid grounds for a motion for a new trial, under Gen. Laws, 1909, cap. 298, § 12, as they are all for "errors of law occurring at the trial." *Murad v. N. Y., N. H. & H. R. R. Co.*, 312.
 2. Plaintiff filed a motion for new trial in the superior court alleging three invalid grounds and further on the ground of newly discovered evidence, but from the date of his motion until its denial, no affidavits of newly discovered evidence were filed.
- Held*, that as the motion for new trial when filed was upon the ground of newly discovered evidence, it was valid, and the fact that plaintiff did not support it upon that ground did not render it invalid, ab initio, and a notice of intention to prosecute a bill of exceptions filed within seven days after the denial of the motion for new trial was filed at the proper time. *Murad v. N. Y., N. H. & H. R. R. Co.*, 312.

See EXCEPTIONS, BILL OF.

NOTICE.

See EVIDENCE, 15; TAXATION, 1-2.

Of Claims Against Towns for Injury on Highway.

See HIGHWAYS, 4-6, 7-9.

OFFICERS.

See EXECUTIONS, 1.

OPTIONS.

See CONTRACTS, 3; DAMAGES, 2; EVIDENCE, 17, 20, 21, 22, 23, 24, 26; GIFTS, 1.

PARENT AND CHILD.

1. In an action brought by a son-in-law to recover for the board of his wife's mother, deceased, the doctrine established in this state as to contracts for services between members of a family, considered; and, *held*, there being evidence of circumstances and statements from which the jury might infer that there was a reasonable and proper expectation on the part of both parties, that compensation was to be made, the case was properly submitted to the jury upon that point as well as upon the reasonableness of the amount claimed for board under all the circumstances. *White v. Almy*, 29.
2. Charge approved, that the statement "you will get your pay when I am gone" of itself is not enough to overcome the presumption that services rendered by a son-in-law to his mother-in-law were rendered through affection, but might be taken into consideration with the evidence, by the jury, in determining whether plaintiff had any proper expectation of compensation.
3. Where there was evidence if believed by the jury, that intestate intended and promised plaintiff that he should be paid after her death for services

rendered it was unnecessary for plaintiff to notify intestate of his intention to charge her for such services, and request to so charge was properly refused. *White v. Almy*, 29.

4. In an action to recover for money loaned, it appeared that plaintiff was the step-father of the female defendant, and at the time of making the loans was living in their household. Defendants claimed the money was a gift:

Held, that plaintiff might show in evidence that defendants brought an action against him for board, since under such circumstances without further explanation the relations of the parties might be presumed to be that of members of the same family, and evidence that they regarded his position as that of a boarder was relevant, as a basis for the argument as to the probability of a boarder making such gifts. *Musk v. Hall*, 126.

5. Plaintiff brought a suit in equity against his mother, among other defendants to set aside a deed from the mother and for specific performance of an alleged agreement to make a will and it was decided that the evidence did not show a contract to make a will or a contract not to revoke the will or conduct estopping her from revoking the same, and bill was dismissed. Thereafter, plaintiff brought suit against his mother, claiming compensation for services, board and expenditures, claiming that the services were rendered because of an agreement that he should be compensated by will.

Held, that the issues were not the same, and the issue in the latter suit was not res adjudicata in the equity suit.

6. *Held*, further, that in the action in indebitatus assumpsit, the burden being on plaintiff to show that the services were not rendered voluntarily and gratuitously, and were not understood by defendant to be so rendered, although the contention in the equity suit had been decided against him, declarations of defendant were properly admissible, even if they had some tendency to show a contract to make a will and an agreement not to revoke the same, for they tended to show that defendant understood that in some way plaintiff was to be compensated. *Messier v. Messier*, 233.

7. In an action by a son against his mother for services, the amount of services rendered would affect the amount of recovery, but not the right of recovery; therefore a request to charge that a small amount of services or small amount of money expended might be considered a gift, but it might be highly improbable that a poor man would give or intend to give a large amount for many years, when other children were contributing nothing, was properly refused. *Messier v. Messier*, 233.

See EVIDENCE, 1-2; LIMITATION OF ACTION, 2-3; WORK AND LABOR, 1-3.

PARTNERSHIP.

See EVIDENCE, 14.

PLEADING.

1. In an action of covenant an allegation of the breach of an ultra vires portion of an agreement between the parties does not render the count demurrable where it alleges another breach of the agreement which constitutes a good

- cause of action, but it should be treated as surplusage. *Sowler v. Seekonk Lace Co.*, 304.
2. In an action of covenant for breach of an agreement under seal, the fact that the agreement set out in the declaration, does not contain a covenant, the breach of which is alleged, does not render the count demurrable, but the matter is surplusage, as is also the irrelevant recital of another agreement between plaintiff and third persons, where disregarding all immaterial matters there still remains allegations of a good cause of action. *Sowler v. Seekonk Lace Co.*, 304.
 3. Counts which do not differ substantially from one another are open to the objection of redundancy, but this cannot be reached by demurrer. *Sowler v. Seekonk Lace Co.*, 304.
 4. A declaration for breach of covenant to employ alleging loss of other opportunities, is not demurrable for not setting out what were the opportunities; with what persons and for what compensation, since a pleader is not required to set out his evidence. *Sowler v. Seekonk Lace Co.*, 304.
 5. Where a declaration alleges several elements of damage, the failure to allege properly one of the items will not render the count demurrable. *Sowler v. Seekonk Lace Co.*, 304.
 6. In an action of covenant, a plaintiff may join all the different causes of action which can be prosecuted under this form of action, at common law. *Sowler v. Seekonk Lace Co.*, 304.
 7. In an action of covenant plaintiff joined two counts in covenant under a sealed agreement with one in the general form of a count in assumpsit, upon an independent cause of action, arising out of a different matter, and he did not join any other count in covenant based upon the same matter.
Held, that, under Gen. Laws, 1909, cap. 283, § 26, plaintiff could properly join the counts, and was not required to disclose either the existence of or the reasonableness of his doubt as to the form of action, but his conclusion that it existed was controlling.
- Decision in *Adams v. Lorraine Co.*, 29 R. I. 333, that the intent of Gen. Laws, 1909, cap. 283, § 26, as to joinder of counts in various forms of action, where plaintiff is in doubt as to the proper action, is to do away with the distinction between certain forms, so far as the adequacy of the writ to support counts in either form is concerned, affirmed. *Sowler v. Seekonk Lace Co.*, 304.
8. In legal theory each count in every declaration is in effect a separate and distinct suit upon a separate cause of action. *Sanitary Oyster Co. v. Merwin Co.*, 381.
 9. Upon a declaration containing two counts in special assumpsit for breach of an express contract and two counts in indebitatus assumpsit, for the value of an option and for work and labor, the court did not err in refusing to order plaintiff to elect between the two sets of counts. *Eastman v. Dunn*, 416.
- See AMENDMENT, 1; DEFAULT, REMOVING, 1; TRESPASS AND EJECTMENT, 1; VERDICTS, 2.
- For Declaration in Action Against Carrier for Negligence.*
- See CARRIERS, 1.

POLICE OFFICERS.

See MUNICIPAL CORPORATIONS, 1.

POWER OF APPOINTMENT.

See WILLS, 17-18.

PREFERENCES.

See BANKRUPTCY, 1-4.

PRINCIPAL AND AGENT.

1. Where plaintiff entered into a contract with defendants who were joint lessees of certain property, defendants must be deemed to be agents each for the other in matters relating to their common interests. *Eastman v. Dunn*, 416.

PROBATE APPEALS.

See APPEAL AND ERROR, 9.

PROCEDURE.

1. Oral agreements of counsel as to what points shall or shall not be raised in a case, are invalid under rule 28 of the Superior Court. *Andrews v. O'Reilly*, 256.

PROFITS.

See EVIDENCE, 8-9.

PURPRESTURE.

See WATERS, 1-3.

RATIFICATION.

See CONTRACTS, 2.

RECORDS.

See BANKRUPTCY, 4.

REFORMATION.

1. On a bill for reformation of a deed, evidence considered, and held to show a mutual mistake, justifying reformation of the deed. *Carroll v. Ryder*, 383.
2. On a bill for reformation of a deed, the question whether a building was actually located within the lines of the lots intended to be conveyed is unimportant where it appears that the removal of an unnecessary portion of the foundation wall would bring the building as a whole within the westerly line of one lot and also within a line drawn in continuation of that line to meet the westerly line of the other lot.
3. Four years after the delivery of a deed conveying by mutual mistake of the parties the wrong premises, and prior to the filing of the bill to reform the

deed, a creditor of grantor attached the lots intended to have been conveyed, without notice of grantee's equity.

Held, that as grantee filed his bill within a reasonable time after obtaining information of the mistake, he was not guilty of laches.

Held, further, that the rights of attaching creditors are determined by the state of the title at the time of attachment and in the absence of fraud and statutory regulations they only obtain the rights which the debtor had in the property at the time, for the creditor is not in the position of a *bona fide* purchaser. *Carroll v. Ryder*, 383.

RELEASE.

See ATTORNEY AND CLIENT, 2-4.

REMAINDERS.

See WILLS, 8-9.

RES ADJUDICATA.

See PARENT AND CHILD, 5.

RIPARIAN RIGHTS.

See DEEDS, 1-2; WATERS, 1-3.

SAFE DEPOSIT COMPANIES.

See GARNISHMENT, 1-6.

SCHOOLS AND SCHOOL DISTRICTS.

1. Owing to the small number of children in a school district, a school was closed and the children sent to another district, under authority of Pub. Laws, January, 1900, cap. 743. The authorities retained the key of the school-house and kept the property therein until it was removed by defendant's grantor. The school authorities had no knowledge of any adverse claim until after an agent of the school committee was sent to make repairs. The building being unlocked, was temporarily secured by the agent, and it was not until later that defendant was found to be in possession, whereupon proceedings were commenced by the town, within a reasonable time, to recover possession, the school committee having voted upon petition filed by residents of the district to open school therein, as soon as arrangements could be made.

Held, that there was no such abandonment or cessation of use of the premises for school purposes as would warrant a forfeiture, under the terms of the deed.

2. Decision in *re* Application of School Committee of North Smithfield, 26 R. I. 164, as to the constitutionality of cap. 1101 of the Public Laws, passed April 17, 1903, transferring the title and interest of abolished school districts to the town, affirmed. *Town of East Greenwich v. Gimmons*, 526.

See DEEDS, 7.

SEVERANCE OF ACTION.

See ACTIONS, 1-2; EXECUTORS AND ADMINISTRATORS, 2.

SIMPLE TOOLS.

See MASTER AND SERVANT, 1-3.

SPECIAL FINDINGS.

See VERDICTS, 1-3.

STATUTES.

1. Marginal notes to statutes while no part of the same, yet afford some indication of the construction placed thereon by the compilers thereof. *Tourjee v. Matteson*, 270.
2. In the construction of statutes, the intent of the whole act shall control, and all the parts be interpreted as subsidiary and harmonious, so that no clause, sentence or word shall be void, superfluous or insignificant. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject matter and general purpose of the statute. If upon examination, the general meaning and object of the statute should be found inconsistent with the literal import of any particular clause or section, such clause or section must if possible be construed according to that purpose. *Sauthof v. American Insurance Co.*, 324.
3. Where a foreign statute has received a definite construction prior to its adoption in this State, the construction given to it in the jurisdiction of its origin will also be adopted when the statute itself is copied. *Rhode Island Hospital Trust Co. v. Dunnell*, 394.

STIPULATIONS OF COUNSEL.

See PROCEDURE, 1.

SURVIVORSHIP.

See WILLS, 12.

TAXATION.

1. A resolution of a city council, passed May 1, ordered the tax assessors to assess a tax on or before August 31. The assessors fixed June 6, at 5 o'clock P. M., as the time for the assessment of such tax and gave notice to bring in accounts of ratable estates owned on the 6th day of June, at 5 o'clock P. M., and that for the purpose of receiving such accounts the board would be in session daily from the 6th to the 10th days of June, from 9.30 A. M., to 12 o'clock noon.
- Held*, that the assessors might select any day not later than August 31, for the assessment of the tax, provided it did not prevent the giving of the statutory three weeks notice under Gen. Laws, cap. 58, § 6.

2. *Held*, further, that the notice was faulty in that no person could know in the forenoon or at noon on June 6, what property he would own at 5 P. M., and so any statements received on that day between 9.30 and 12 noon were valueless.

Held, further, that as it did not appear that any statements were then received or that any person was misled and there was ample time provided on the other days, for the reception of accounts, in a proceeding brought by the attorney-general for the purpose of vacating the assessment, so as to prevent the placing of certain names assessed for personal property upon the voting-lists, this defect would not avail the petitioner.

3. Discrimination by a board of tax assessors in favor of certain tax payers, is no ground for relief in a proceeding brought by the attorney-general for the purpose of vacating the assessment so as to prevent the placing of certain names assessed for personal property upon the voting lists, the persons affected not being parties to the proceeding.

4. The proper remedy against assessors who neglect or refuse to assess taxable persons or property is by mandamus to compel them to do so, but the petition for such writ must be brought against the assessors before the assessment roll has passed from their possession.

5. The action of a board of tax assessors in assessing 120 persons for personal property in the sum of \$200 each, by a vote of two assessors to one, is not the action of a majority, but that of the full board, the vote of the majority being decisive.

6. Gen. Laws, cap. 58, § 3, provides that "all property liable to taxation shall be assessed at its full and fair cash value." Cap. 58, § 4, provides that "the assessors shall assess and apportion any tax on the inhabitants of the town and the ratable property therein, at the time ordered by the town."

Held, that it was the duty of the assessors to assess every person and all property liable to taxation and they were not excused from this duty in case no account was rendered, and therefore, the assessment roll still being in their possession, but after the time limited for filing accounts had expired, where the assessors accepted a list of names and assessed the persons each for the sum of \$200, their action is not subject to review in a proceeding brought by the attorney-general for the purpose of vacating the assessment, so as to prevent the placing of certain names assessed for personal property upon the voting-lists. *Greenough v. Board of Canvassers*, 84.

7. After the adoption of a resolution of a town meeting "Resolved that the town council be and hereby is authorized for the period of one year from and after the passage of this resolution to exempt from taxation for the period not exceeding ten years any manufacturing property that may hereafter be located in said town of X. in consequence of such exemption and the land upon which such property is or may be located," plaintiff petitioned for an exemption of certain property "for a period not exceeding ten years;" and the petition was granted according to the terms of its prayer:—

Held, that a reasonable construction of the vote was that an exemption was granted for a period of ten years.

8. A vote exempting property from taxation for a period not exceeding ten years, was passed September 6, 1900. September 15, 1910, the property was assessed:—

Held, that as no steps were taken until September 17, 1900, to bring the property into existence or to locate it upon land in the town and as until such steps were taken there was nothing upon which the exemption could operate, the period did not begin to run until that date. *Lonsdale Co. v. Taft*, 496.

TIME, COMPUTATION OF.

See HIGHWAYS, 5.

TOOLS.

See MASTER AND SERVANT, 1-3.

TOWN COUNCIL.

See MUNICIPAL CORPORATIONS, 1; WATERS, 3.

TOWN OFFICERS

See ABATEMENT AND REVIVAL, 1-2; EVIDENCE, 12-13; MUNICIPAL CORPORATIONS, 1-6.

TOWN MEETINGS.

1. Gen. Laws, 1896, cap. 37, § 8 (now Gen. Laws, 1909, cap. 47, § 8), provides that "The notice to the electors to meet in a town meeting prescribed by law shall be given by the town clerk issuing his warrant, directed to the town sergeant or one of the constables of such town, requiring him to post at least seven days before the day appointed for such meeting, written notifications in three or more public places in the town, of the time when and the place where said meeting is to be holden, *and of the business required by law to be transacted therein.*"

Section 4 of an act, entitled "An act dividing the town of Cumberland into districts for the purpose of voting," passed at the May session, 1856, provides, "A town meeting shall and may hereafter be held annually at the town house in said town, and notified by the town clerk in the warrant for said meeting on the second Monday of June, for the transaction of such general business of the town as may legally come before said meeting:"—

Held, that, as there was no requirement either by general law or special act, that any specified matter of business should be transacted at the annual town meeting of said town, such meeting was not illegal because "the business required by law to be transacted therein" was not stated in the warrant for said meeting and was not contained in the notices to the electors. *Lonsdale Co. v. Taft*, 496.

TOWNS, AGENCY OF OFFICERS OR AGENTS.

See HIGHWAYS, 2.

TRESPASS.

1. When a conditional license is relied upon in defence to an action of trespass, the burden of proving the license and performance of its conditions is upon the one alleging the same. *Chapman v. Pendleton*, 160.
2. To enter upon land with the intention to act in such a manner as to put it out of one's power to comply with a condition of the license granted, would constitute a trespass, and in the absence of any explanation, the jury may infer a motive from the conduct of the persons concerned. *Chapman v. Pendleton*, 160.

See ASSAULT AND BATTERY, 1-2; HIGHWAYS, 2.

TRESPASS AND EJECTMENT.

1. In an action of trespass and ejectment, where the possession of the premises is admitted by the defendant's pleas, it is unnecessary for plaintiff to prove it. *Narragansett Real Estate Co. v. Mackenzie*, 103.

See WATERS, 3

TRIAL.

1. A ground for a motion to direct a verdict that "the hole was impossible to have been there" is too general to be considered. *Beebe v. Greene*, 171.
2. It is for the jury and not for the court to pass upon the credit to be given to the witnesses, and the weight of their testimony, and the court should hesitate either in removing a case from or requiring a verdict by a jury, on the ground that something, the subject of human testimony, was absolutely impossible. *Beebe v. Greene*, 171.

TRUSTS.

See EQUITY, 1, 2, 3, 4; WILLS, 1-12; 17-18.

ULTRA VIRES.

See CORPORATIONS, 1; GUARANTY, 1-3.

VERDICT, DIRECTION OF.

See TRIAL, 1.

VERDICTS.

1. In an action of trespass arising out of the taking of land for highway purposes, a general verdict of guilty is not inconsistent with a special finding that the construction of the highway was made with the consent of plaintiff, where such consent referred to an understanding between plaintiff and the town which was not carried out by the latter, and not to a consent to the construction after it was completed. *Chapman v. Pendleton*, 160.

2. Where on a declaration containing counts for breach of an express contract and counts in indebitatus assumpsit, the jury found by a special finding that there was an express contract, it is to be inferred that a general verdict was based upon the breach of such an express contract. *Eastman v. Dunn*, 416.
3. Where upon a declaration in several counts, defendant had the opportunity to submit issues to the jury under each count, but refused, it cannot thereafter complain of a general verdict which the court finds to be conservative under the evidence. *Eastman v. Dunn*, 416.

WAIVER.

See ABATEMENT AND REVIVAL, 1-2; EXECUTORS AND ADMINISTRATORS, 6, 11.

WATERS.

1. Pub. Laws, R. I. (1745-1752, p. 21), "An act for quieting Possessions and establishing Titles of Land, within the towns of Bristol, Tiverton, Little Compton, Warren and Cumberland," did not have the effect of bringing over into this State the Colonial Ordinance of 1641-1647 of the Massachusetts Bay Colony, giving the fee of tide flowed lands to the littoral proprietor to low water mark, not exceeding 100 rods from high water mark.
2. A plaintiff by proof of title to land bounding upon salt water in the town of Little Compton, has title in fee only to ordinary high water mark, and the fee to the land below ordinary high water mark is in the State. *Narragansett Real Estate Co. v. Mackenzie*, 103.
3. An inhabitant of Little Compton petitioned the town council for leave to build a wharf within that portion of the cove granted to the inhabitants under the above ancient deed, specifying the location. This petition was granted. Subsequently the General Assembly authorized the petitioner to build a wharf in the cove, "from the road or way," subject to the approval of the town council. This approval was granted. The wharf and a building adjacent thereto were supported upon spiles below ordinary high water mark, the only connection with the upland being by means of planks, used for entrance from a public highway. The planks were made a part of the highway and were not in any way an obstruction to travelers. This highway existed of the authorized width of 33 feet, bounded on the east by a wall and on the west by the waters of the cove and at the wharf and building the distance between the wall on the east and the line of ordinary high water on the west was several feet less than 33 feet, so that if the highway had been constructed its full width it would have extended westerly beyond ordinary high water mark. In an action of trespass and ejectment to recover possession of the land bounded westerly by the cove, together with the wharf and building projecting westerly into said cove:
Held, that the wharf and building rested upon soil, the fee of which was in the State and the plank approach was a part of the public highway, which defendants in common with the public had a right to use, the approach

offering no obstruction either to the public or the plaintiff in the use of any land owned by it.

Held, further, that the privilege being originally granted to the inhabitants of the town, the function of the town council in granting the license to build the wharf, was in exercise of its general powers to manage the affairs of the town, having the effect merely of determining the location and size of the wharf and giving permission to connect it with a highway, and was in no sense a conveyance of property requiring the vote of a financial town meeting. It was a regulation of the exercise of the right rather than a grant of a right.

Held, further, that while there was no evidence as to whom the building belonged, or under what claim of right defendant held it, and while it might be a purpresture and its connection with the highway unauthorized by the town council, it did not follow that plaintiff was entitled to possession, for if it were a purpresture it might be abated on behalf of the state or if its connection with the highway infringed the rights of the public that might be the subject of action by the town, but as plaintiff had failed to show that it was upon land to which he was entitled to possession, a verdict for plaintiff was not warranted. *Narragansett Real Estate Co. v. Mackenzie*, 103.

WHARVES.

See *WATERS*, 1-3.

WILLS.

1. In the construction of a will, the intent of testator must be gathered from the whole will, and to ascertain the intention the court will consider the circumstances under which it was written, in order to look at it as far as possible from the testator's point of view.
2. Will construed and *held*; that while testatrix used language in the first instance, appropriate for the creation of a legal life estate in the entire residuary property, real and personal, the scheme of the will was based upon the establishment of a trust estate, entitling the husband to an equitable interest in the income only.
3. Will construed and *held*; that language showing intention of giving husband of testatrix a life estate in the whole income was modified by later provisions showing intention that income from estate of husband should be used up for his support and only such portion of estate of testatrix should be used as became necessary, after his own resources were exhausted.
4. The fact that testatrix used words in a provision of a holographic will which in their technical meaning would create a life estate, will not be allowed to override the plain intent of the provisions taken as a whole, so as to prevent the creation of a trust estate or to nullify other provisions of the will relating to the disposition of the income by the trustees.
5. Where the context or other parts of a will indicate that technical words are not used in their ordinary technical meaning, they will be interpreted in the sense intended by testator.

6. Will construed and *held*; that from the language "all income exceeding what is necessary for taxes, repairs, incidental expenses and salary of trustees to be credited to my estate, but to be used freely for the benefit of my husband, whenever his own income does not prove sufficient; but always his own income is first to be expended upon him and then when necessary falling back upon the income accruing from my trust estate."
- "And all of the residue of the net income, to pay to my husband for his own use if he be able to care for and use the same, if not, deposit it in the name of my trust estate to be used for any necessity for his comfort," it was the intent of testatrix that the trustees should accumulate the income, over and above such portion as might be expended for the support of the husband, and such accumulated income became a part of the trust estate to be distributed in accordance with the subsequent provisions of the will.
7. If a part of the income of a trust estate is undisposed of, the trustees should, even in the absence of any provision, accumulate it and pay it to the legatees entitled to the original corpus of the estate.
8. Upon the question of anticipating the payment of surplus income during the lifetime of the life-tenant of a portion of such income, while it appeared that in all probability the principal of the trust estate would be sufficient to pay the pecuniary legacies, yet as large portions of both real and personal estate were specifically devised and bequeathed and other portions would have to be sold to raise the necessary funds, and it could not be known what would be realized from such sales, the court is not warranted in ordering payment of such income from time to time during life of life tenant, because it could not be determined at this time whether there was sufficient property to carry out all the provisions of the will and leave the accumulated income intact and for the further reason that the vested remainder was subject to open and let in any grandchildren born after death of testatrix, who might become entitled to share in the distribution of the residuary estate of which the accumulated income formed a part.
9. After leaving such portion of the income of a trust estate as was necessary for support of life tenant the residuary gift was as follows:—"Whatever may now be left of the so-called trust estate, I bequeath to the children and grandchildren of Maria and William Whipple Brown, of Providence, and Charlotte Perkins Gilman and daughter Catherine Stetson, to be equally divided, share and share alike."
- Held*, that the children and grandchildren of William Whipple Brown, together with Charlotte Gilman and Catherine Stetson, together took a vested remainder in the residuary estate at death of testatrix, subject to the limited equitable life estate.
- Held*, further, that a grandchild who deceased after death of testatrix, being entitled to a vested estate in remainder, her interest in the real estate descended to her heirs and in the personal property, to her husband, unless disposed of by her will.
- Held*, further, that the children and grandchildren took per capita with Charlotte Gilman and Catherine Stetson and with each other.
10. Testamentary provisions:—"Within two months of my death I wish personal property sold to give B. \$1,000:" Then followed a provision for the use of a

house as a home for her husband. "If B. should be in my employ and wish to continue he is to be retained at \$40 each month and his room and board, his work to be to take care of the house and give some attention to (her husband). Should B. not be satisfied after giving it a fair trial he is to receive on leaving \$500 with his wages, but should he remain with (husband) during his life, he is then to have \$2,000 for his faithful services to us both."

In another part of the will testatrix made provision for her husband in the event that he was not able to live in the house, with no provision for B. The husband never used the house.

Held, that the clause relative to B.'s wages was not intended as a gratuity, but as a provision for the support of the husband in a contingency which had not occurred.

Held, further, that B. was not entitled to the sum of \$500 since circumstances did not allow him to "give it a fair trial" and the legacy of \$2,000 was conditioned on B.'s remaining with the husband during his life which could not happen.

11. Where a gift by will is made on an express condition precedent, which becomes impossible of performance (and the existence of impossibility is unknown to the testator), the gift cannot vest.

12. Testamentary bequest:—"At the death of my said husband, I bequeath all the rest of my said trust estate—"Out of which (the general trust fund) are first to be taken the following bequests, if all the parties are then living, if not their portion is to be retained in the general fund, until the so-called trust estate is fully closed." "To B. \$2,000."

Held, that B. was entitled to the legacy only if he survived the husband, the meaning of the clause being that the gift was not to be paid to his personal representatives, but retained in the general fund. *Perry v. Brown*, 203.

13. Where X and Y were legatees and also residuary legatees and devisees, and X deceased in life time of testatrix, intestate, and without issue, the legacies which thereby lapsed, passed into the residue and the entire residue thus augmented passed to Y. *Woodward v. Congdon*, 316.

14. Under the rule of the common law as adopted in this state, lapsed legacies fall into the residue, and Gen. Laws, 1896, cap. 203, § 7 (now Gen. Laws, 1909, cap. 254, § 7), provides that unless a contrary intention appears in the will, lapsed devises shall fall into the residue, and if a residuary devisee or legatee die before testator without leaving issue living at testator's decease, the remaining residuary devisees or legatees shall take his share, as therein provided.

Held, that the intent of the statute was to prevent intestacy in the case of a lapsed residuary devise or bequest and to provide for survivorship where any residuary devisee or legatee remains at death of testator.

Held, further, that where an estate was left in such manner that a lapse might occur, without any ultimate disposition of such legacies or devises as might lapse, other than that contained in a general residuary clause, the testator must be deemed to have executed the will with regard to the provisions of the statute. *Woodward v. Congdon*, 316.

15. A will should be construed so as to avoid partial intestacy if such construction is natural and reasonable. *Woodward v. Congdon*, 316.
16. Where one of two residuary devisees and legatees deceased within a week after the execution of the will, since the will is to be deemed to have been executed in view of Gen. Laws, 1896, cap. 203, § 7 (now Gen. Laws, 1909, cap. 254, § 7), of lapsed devises and legacies, it is to be presumed that if testatrix had not intended the remaining residuary devisee and legatee to take under such statute, she would have made other provision for the disposal of that portion of the estate. *Woodward v. Congdon*, 316.
17. A fund was left to a trustee to pay over the income to X. for her life and upon her death to stand seized "to such uses and in such manner and for such persons as such deceased shall by her last will declare and appoint concerning the same; and in default of such will then in trust for such persons as shall be the then heirs at law of such deceased, of my blood according to the statutes of descent then in force in said State of Rhode Island, such persons to take in the proportions prescribed by the same statutes."
- X. deceased leaving a will containing no reference to the power of appointment or to the fund, but containing a residuary clause bequeathing "all the rest, residue and remainder of my estate and property of which I may die seised or possessed or to which I may be entitled, whether real or personal":—
- Held*, that, under Gen. Laws, 1896, cap. 203, § 9 (now Gen. Laws, 1909, cap. 254, § 9), "a bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will," the bequest included the personal estate over which she had the power of appointment, and operated as an execution of the power. *R. I. Hospital Trust Co. v. Dunnell*, 394.
18. While the law of the domicile of the donor controls as to the execution of the power by the donee, the fact that the will giving the power was made and took effect before a change in the statutes, is immaterial, for where the will of the donor did not specify that the power should be executed only by a special form of will, the legislature can determine the construction of a later will and give it the effect of executing a previously granted power. *R. I. Hospital Trust Co. v. Dunnell*, 394.

See WORK AND LABOR, 1-3.

WITNESSES.

Taking Testimony in General.

1. Where in an action for personal injury, the court inquired of a physician, a witness for defendant, if he knew certain physicians, who the court stated had testified before him in another case, and asked "would you be surprised that they said it was extremely rare, they had only known two or three cases," the conduct of the court did not constitute prejudicial error where he

properly instructed the jury that he was not a witness and that they were not to attach any importance to his remarks as testimony.

2. The trial court may properly inquire of any witness expert or ordinary as to his meaning in the use of terms employed by him. *Beebe v. Greene*, 171.

See TRIAL, 1-2.

WORDS AND PHRASES.

1. Under the statutes of this State, the word "inhabitants" has always had a corporate rather than an individual significance in relation to municipal subdivisions. *Town of East Greenwich v. Gimmons*, 526.

WORK AND LABOR.

1. A man who expects to be paid for his services by a legacy cannot afterwards resort to his action for the value of such services, if only a mere expectation on his part is shown. *Messier v. Messier*, 233.
2. Where a son gave board or services or paid out moneys for his mother with her consent with the expectation of being paid therefor by will, and the mother expected to pay for the same by will, then he can recover therefor in an action of assumpsit what is reasonable, where the mother has by conveyance of her property put it out of her power to compensate him by will. *Messier v. Messier*, 233.
3. In an action by a son against his mother for services rendered a request to charge based solely on the expectation of compensation, was properly refused. *Messier v. Messier*, 233.

See LIMITATION OF ACTIONS, 1; PARENT AND CHILD, 3.

WRITS.

See COURTS, 2.

Ex C.
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